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No. _____

In The

Supreme Court of the United States

October Term, 1997

JERRY D. COUCH,

Petitioner,

v.

SPRINT CORPORATION,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether Sprint's commitment to diversity which included considering a person's race and sex in making hiring and promotion decisions thereby creating preferences in employment decisions based on race and sex is in violation of Title VII.

2. Whether Sprint's commitment to diversity which included considering a person's race and sex in making hiring and promotion decisions creates an inference of discrimination which would support the jury's unanimous verdicts that Sprint discriminated against Couch based on race and sex.

3. Whether the court's disregard for the clear standard to be followed in granting judgment as a matter of law thereby setting aside unanimous verdicts in favor of Couch on all claims violates Couch's right to trial by jury.

4. Whether the district court and Eighth Circuit are applying inconsistent standards in ruling on judgment as a matter of law pursuant to Rule 50 by applying one standard when the motion is granted before submitting the case to a jury and a different standard when reviewing such a motion after the case is submitted to the jury and verdicts are returned.

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PETITION FOR WRIT OF CERTIORARI

Jerry D. Couch ("Couch") respectfully petitions the Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

On December 18, 1997, the Eighth Circuit issued its opinion affirming the judgment of the district court and agreeing with the District Court's analysis and conclusion. *See* Eighth Circuit Rule 47B. App. 1-2.[1] The Eighth Circuit followed the analysis, conclusions and opinion of the District Court contained in its written opinion filed on December 26, 1996. App. 12-31. The opinion of the Eighth Circuit is reported at 131 F.3d 764. The District Court opinion is unpublished. On January 28, 1998, the Eighth Circuit denied Couch's motion for rehearing by the panel and for rehearing en banc. App. 32.

JURISDICTION

On January 28, 1998, the United States Court of Appeals for the Eighth Circuit denied the suggestions for rehearing en banc and by the panel. App. 32. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

[1] References to the Appendix to this Petition shall be referred to as "App." with the page number(s). The trial transcript shall be referred to as "Tr." with the page number(s). Any reference to the Appellate Appendix submitted by Couch shall be referred to as "Aplt. App." with the page number(s).

STATUTES AND RULES INVOLVED

Couch brought claims pursuant to Title VII of the Civil Rights Act of 1964, as amended. The following statutory provisions are involved:

42 U.S.C. § 2000e-2(a)

> It shall be an unlawful employment practice for an employer (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex or national origin; or (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2(j)

> Nothing contained in this subchapter shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this subchapter to grant preferential treatment to any individual or to any group because of the race, color, religion, sex or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer, referred or classified for

> employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section or other area.
>
> 42 U.S.C. § 2000e-3
>
> It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

This case also involves the correct standard for granting judgment as a matter of law. Federal Rule of Civil Procedure 50(b) provides:

> If, for any reason, the court does not grant a motion for judgment as a matter of law made at the close of all the evidence, the court is considered to have submitted the action to the jury subject to the court's later deciding the legal questions raised by the motion. The movant

> may renew its request for judgment as a matter of law by filing a motion no later than 10 days after entry of judgment – and may alternatively request a new trial or join a motion for a new trial under Rule 59. In ruling on a renewed motion, the court may: (1) if a verdict was returned; (A) allow the judgment to stand, (B) order a new trial, or (C) direct entry of judgment as a matter of law; or (2) if no verdict was returned; (A) order a new trial, or (B) direct entry of judgment as a matter of law.

STATEMENT OF THE CASE

A. Summary of Claims and Disposition.

Couch brought claims of reverse discrimination against Sprint Corporation ("Sprint") based on sex and race discrimination and a aretaliation claim each brought pursuant to Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.*, and the Missouri Human Rights Act, Mo. Rev. Stat. § 213.055. Couch contended that Sprint passed over him for promotion based on his race and sex and retaliated against him for complaining about this conduct. All three claims were submitted to the jury with unanimous verdicts being returned in favor of Couch on all claims, assessing compensatory damages as follows: sex discrimination, $5,000; race discrimination, $10,000; and retaliation, $100,000.

At the close of Couch's evidence, Sprint filed its Motion for Judgment as a Matter of Law as to all claims and punitive damages. The district court granted Sprint's Motion as to punitive damages only and did not submit

them to the jury. Pursuant to Federal Rule of Civil Procedure 50, the court took the remaining issues of the Motion under advisement and submitted the case to the jury. After the verdicts in favor of Couch on all claims, Sprint renewed its Motion for Judgment as a Matter of Law or in the alternative for a New Trial. On October 25, 1996, the district court heard oral arguments and granted Sprint's Motion for Judgment as a Matter of Law thereby setting aside all three verdicts. The court denied Sprint's Motion for New Trial.

On November 4, 1996, Sprint filed a motion to alter or amend the judgment as to the court's ruling on new trial. On December 26, 1996, the district court issued its order granting judgment as a matter of law and granting the motion to reconsider its ruling on a new trial. App. 12-31. On March 25, 1997, the court issued its order reversing its earlier ruling on new trial and granted Sprint a new trial. App. 3-11. Couch appealed the court's rulings on judgment as a matter of law and new trial. The Eighth Circuit affirmed the district court's decision on judgment as a matter of law thereby setting aside unanimous jury verdicts on all claims. App. 1-2.

B. Relevant Facts.

In 1993, Sprint made a corporate decision to reorganize the Materials Management department (name changed to "Materials and Services Management"; hereinafter referred to as "MSM"). John Meyer, Senior Vice President, was responsible for MSM and was involved in the decision to reorganize. Couch was employed by

Sprint in the MSM department at the time of the reorganization.

As a part of the reorganization, Sprint pursued a corporate-wide commitment to diversity which it believed was important to its business. Mr. Meyer expected all management persons reporting directly to him to share and implement the commitment to diversity. Mr. Meyer directed that minorities and females be included on the management team. The commitment to diversity was separate and apart from Sprint's affirmative action program. Sprint's corporate-wide commitment to diversity was self-imposed, not required by any law. Sprint did not present any evidence as to an imbalance in the work force or any other evidence of a history of discrimination to justify the implementation of the commitment to diversity.

It was undisputed at trial that the commitment to diversity applied to the actual hiring and promotion decisions at Sprint. Mr. Meyer plainly testified that Sprint's commitment to diversity included considering race and sex in making hiring and promotion decisions.

> Q. (to Mr. Meyer) . . . So in terms of this commitment to diversity, a part of that commitment was considering a person's race to fill that position, is that correct?
>
> A. It was one of the elements that we considered when filling a position, Yes.
>
> Q. And that's a part of the commitment to diversity, isn't that correct?
>
> A. Yes.

Q. And the person's sex was also another consideration as a part of the commitment to diversity, is that correct?

A. Yes. (Tr. 145, line 24 to 146, line 9)

Q. (to Mr. Meyer) So in hiring and promoting people to its work force, Sprint is to take into account that commitment to diversity, correct?

A. Yes.

Q. And that includes, as a part of the commitment to diversity, race and sex, correct?

A. Yes. (Tr. 202, line 24 to 203, line 5)

Kay Brown, Director of Fair Employment Practices, stated that Sprint's commitment to diversity included considering a person's race and sex in hiring and promotion decisions. Ms. Brown, whose responsibilities included integrating Sprint's commitment to diversity, stated that the commitment was to make sure that Sprint was diversified in terms of race and sex. She stated that diversity was key to having a highly representative work force.

Pursuant to the commitment to diversity, the new management team for MSM assembled at Mr. Meyer's direction included minorities and females. Lauren Wright, a white female, was selected to be the Assistant Vice President over MSM. She replaced a male in that position. When Lauren Wright took over the position, there were seven white males reporting directly to Ms. Wright who had previously reported to her male predecessor. Mr. Meyer advised Ms. Wright that as she built her own management team, she should use that as an opportunity to find qualified females and minorities. Ms.

Wright herself believed that every hiring and promotion opportunity was an opportunity to further diversify the work force.[2] Ms. Wright expected those who reported directly to her to share the commitment to diversity.[3] Ms. Wright selected a management team which consisted of three white males, two minority males and one white female. The new team began in January 1994.

As a part of the reorganization, Benn Sledge, a black male, was made the Director of Contracts and National Agreements ("CNA"), a smaller group within MSM. Mr. Meyer and Ms. Wright selected Mr. Sledge for the position. Ms. Wright told Mr. Sledge during the selection process that things were getting better at Sprint in terms of diversity in that minorities and females were able to advance. Mr. Meyer also told Mr. Sledge that things were changing at Sprint and that Sprint recognized the need for diversity and was doing something about it. Mr. Sledge would serve in that position approximately eighteen months from January 1994 to September 1995.

Mr. Couch was employed by Sprint at the time of the reorganization within MSM as a national agreements negotiator within the CNA group. Mr. Couch had been

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[2] Several Sprint employees recalled that in a meeting with all employees of MSM, Ms. Wright said something like she viewed every hiring and promotion opportunity as an opportunity to further diversify the work force. Sara Miller, Tr. 667, l. 14-668, l. 12; Sara Shepherd, Tr. 765, ls. 5-24; Couch, Tr. 1112, ls. 2-20; and Benn Sledge, Tr. 409, l. 21-410, l. 6.

[3] Donald McCormick, Director of Procurement within M&SM who reported directly to Ms. Wright, stated that the commitment to diversity was a commitment to the hiring of minorities and females. Tr. 830, ls. 10-19.

employed by Sprint approximately nine years when diversity became the driving commitment of Sprint. Couch was initially hired by Sprint to begin the national agreements group as they had not been using national contracts before that time. From the date of his employment to the beginning of the reorganization in January 1994, Couch's performance was rated as either above expectations or fully satisfactory. Couch was never disciplined or demoted during that same time.

During the eighteen month period that Mr. Sledge served as the Director of CNA, the advancements within the group went overwhelmingly to females or minorities. Overall, the facts were undisputed – of the 19 employment advances in Mr. Sledge's group, 16 went to females or minorities. App. 33-34. Couch presented evidence at trial that white males applied for all but two of these positions. One of the most sought after positions within the group was Lead Negotiator. The position was highly sought after based on the salary grade and salary range. In early 1994, Sprint posted an announcement for four available lead negotiator positions. Fifty-two applications were received for those positions, thirty-six from males and sixteen from females. All four positions initially filled in Mr. Sledge's group were given to females. Couch applied for all four positions.

In addition, all management positions filled in 1994 by Mr. Sledge went to females or minorities. Manager of National Agreements was filled twice in 1994 – both advancements went to females. Sprint violated its own job posting guidelines and did not post the position the first time it was filled. Couch applied for the position the

second time it was filled and was passed over for a female. Manager of Corporate Agreements was filled twice in 1994 – one to a female and one to a black male. Sprint violated its own job posting guidelines and did not post the position the first time it was filled. Mr. Couch was promised by Mr. Sledge that he would be considered for the position the second time it was filled. Instead, it was awarded to a less qualified and, according to Couch's evidence, an unqualified black male. Couch presented credible evidence that he was more qualified than Sara Shepherd, who was promoted over him to Manager National Agreements in October 1994, and more qualified than Isaiah Brown, who was hired as a Manager Corporate Agreements. In the first ten months of the diversity movement as implemented in Mr. Sledge's group, all highly paid or management positions were awarded to females or minorities.

Couch presented evidence that Sprint's written job posting guidelines were violated in order to advance females and minorities. Sprint violated its policy of posting vacancies in advancing females; Sprint violated its policy that a person be in their position one year before advancement in favor of females; and Sprint changed job postings by taking out requirements to make females and minorities appear qualified for positions.[4] Sprint presented no evidence that white

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[4] The job requisition for Lead Negotiator which was filled by Sara Miller was changed by Mr. Sledge to remove the educational requirement. Mr. Sledge admitted he knew Ms. Miller would not meet that requirement. The job posting for the position of Manager Corporate Agreements filled by Isaiah Brown, a black male, was changed to remove the requirement of software development and intellectual property knowledge. It

male employees were similarly benefited by its violation of job posting policies.

During Mr. Sledge's tenure as Director of CNA, only three employees in his group were adversely affected – all white males. Couch and another white male were demoted. Only one position was eliminated as a result of the reorganization – a white male's position. No females or minorities in Mr. Sledge's department were demoted. In nine years of previous employment with Sprint, Couch had never been disciplined or demoted for any reason. In less than one year after diversity becomes the aggressive plan, Couch is demoted.

Couch's retaliation claim involved his complaint about being passed over for promotion to Manager National Agreements for Sara Shepherd. On October 26, 1994, Couch complained to Benn Sledge that he was passed over for a female. It had been the sixth time in ten months. Mr. Sledge got very mad and took Couch's challenge as a complaint. Just 56 days after his complaint, on December 15, 1994, Mr. Sledge demoted Couch allegedly because of his actions in amending a pager contract. Couch presented credible evidence that the pager contract had to be amended because the provider was suffering an economic hardship due to abnormally high usage, that the provider would not continue to suffer the hardship and the contract could be terminated in thirty days.

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was undisputed that Mr. Brown did not have this knowledge. Once Mr. Brown left the company, the position was reposted and software development and intellectual property knowledge was once again a requirement for the position.

Couch determined that the provider was the only one who could provide the needed service at the best price.

Couch followed Mr. Sledge's instructions and fiscal policies and amended the agreement. Other experienced contract negotiators testified that circumstances could arise which would justify renegotiating the terms of an existing contract, that it was not unusual to renegotiate even though months or years may remain on the term of the agreement, that renegotiation could involve an increased cost to Sprint and that economic hardship to a vendor could be a basis to renegotiate a contract.

REASONS FOR GRANTING THE WRIT

1. **The Court should grant the writ to determine whether Sprint's commitment to diversity which included considering a person's race and sex in making hiring and promotion decisions thereby creating preferences in employment decisions based on race and sex is in violation of Title VII.**

There has been a dangerous course developing in corporate America. One need only talk to persons employed in corporate America today to see how widespread this course has become. Corporate America is dedicating considerable time and resources to this course. The course is most commonly referred to as "diversity" in the work place. The course is dangerous because, even though cloaked in what may appear to be a desirable goal, it is nothing less than creating preferences based on race and sex in making employment decisions. Such a

course is in violation of Title VII. Sprint plainly followed this dangerous course.

The Third Circuit addressed this course in the context of public education. In *Taxman v. Board of Education of the Township of Piscataway*, 91 F.3d 1547 (3rd Cir. 1996), the school board was unabashed in its position – they terminated a white employee and kept a black employee in the name of maintaining a "culturally diverse" work force. *Id.* at 1552. The issue was so clear cut to the district court that it granted summary judgment in favor of Ms. Taxman. The issue was likewise clear to the Third Circuit. After a review of the purposes and legislative history of Title VII, the Third Circuit was left with only one firm conclusion – "there is no congressional recognition of diversity as a Title VII objective requiring accommodation." *Id.* at 1558. *See also Regents of the University of California v. Bakke*, 438 U.S. 265, 307 (1978) ("Preferring members of any one group for no reason other than race or ethnic origin is discrimination for its own sake. This the Constitution forbids."); *Hopwood v. State of Texas*, 78 F.3d 932, 940 (5th Cir.), *cert. denied*, 116 S.Ct. 2581 (1996) (holding that "the use of ethnic diversity simply to achieve racial heterogeneity, even as part of the consideration of a number of factors, is unconstitutional").

The issue of diversity has been addressed by this Court most often in the context of a public employer or public project and under a constitutional analysis. *See Bakke; Fullilove v. Klutznick* , 448 U.S. 448 (1980); *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986); *Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989); *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995). However, in *United Steel Workers of America v. Weber*, 433 U.S. 193 (1979), this court

addressed whether Title VII permits employers in the private sector to make race conscious employment decisions absent some need to "eliminate manifest racial imbalances in traditionally segregated job categories". *Id.* at 197. The general holding was that Title VII "does not condemn all private, voluntary, race-conscious affirmative action plans." The action in *Weber* was not condemned because of the clear pattern of racial segregation in the specified job categories which justified race-conscious decisions. *Id.* at 208. The action likewise did not "unnecessarily trammel the interests of white employees" because it did not require the termination of white employees and did not bar their advancement. *Id.*

The Court's cases in this area, whether in the public or private sector, demand that any decision based on an otherwise impermissible act of discrimination be justified by a showing of prior discrimination. *Fullilove*, 448 U.S. at 518-19; *Wygant*, 476 U.S. at 276-77; *Croson*, 488 U.S. at 500; *Adarand*, 515 U.S. at 228-29. There must be a remedial need to justify making employment decisions based on race and sex or such decisions are in violation of the Constitution and Title VII. *See also Messer v. Meno*, 130 F.3d 133, 136 (5th Cir. 1997) ("Diversity programs, no matter how well-meaning, are not constitutionally permissible absent a specific showing of prior discrimination, because 'good intentions' alone are not enough to sustain a supposedly 'benign' racial classification.") (*citing Adarand*, 515 U.S. at 228-29).

Sprint's conduct in this case is a perfect illustration of corporate America's commitment to the course of diversity. It is also a classic case of such a course, however well meaning, being in violation of Title VII. The undisputed

evidence was that Sprint aggressively implemented a commitment to diversity in hiring and promoting persons. That commitment included considering a person's race and/or sex in filling positions. Sprint viewed *every* hiring and promotion opportunity as a opportunity to diversify its work force. It was Sprint's *express intent* to diversify the work force by considering race and sex in employment decisions.

Sprint's actions prove this aggressive commitment to diversity. Mr. Meyer directed the reorganization, held strongly to the commitment to diversity and directed that minorities and females be found for the management team. The management team, previously led by a male with seven white male managers, became headed by a female and was newly composed of two black males, a white female and three white males. The undisputed evidence was that in Couch's department during the time Benn Sledge was director, Sprint made 19 employment decisions. Of those 19 advancements, 16 went to minorities and females. Couch was passed over six times for high paid or management positions in favor of females. He was also passed over for a less qualified minority male. The reasonable inference from the evidence is that Sprint passed over Couch, a white male, based on his race and sex.

The evidence is undisputed – Sprint pursued diversity with a vengeance and considered race and sex in making employment decisions. The actions of Sprint spoke just as loudly as their words. There is no question that Sprint made race based and gender based employment decisions pursuant to the goal of diversity. What is critical is that Sprint did not offer any evidence of a

remedial need to make such decisions. The testimony was that diversity was not required by law; it was wholly voluntary and completely separate from its affirmative action program. Furthermore, the evidence showed that the interests of white males were being unnecessarily trammeled. In the absence of evidence of prior discrimination such that race based or gender based decisions were remedial in nature, Sprint's commitment to diversity so aggressively implemented is in violation of Title VII.

The Court should grant a writ to address this issue of great public importance. Corporate America has chosen to pursue a course of diversity without regard for the prohibitions of Title VII and without regard for any need to do so. It continues undisturbed. In the name of seeking a diverse work force, Sprint without hesitation admitted that it considered race and sex in making employment decisions. Such a course violates Title VII and any corporate commitment to diversity which is so designed is in violation of Title VII. The Court granted cert in *Taxman* but missed the opportunity to address this issue of great importance when the case settled. The Court should grant a writ in this case to again seek to address this unique and important issue. The Court must communicate to corporate America that race and gender based decisions under the guise of diversity violate Title VII.

2. Whether Sprint's commitment to diversity which included considering a person's race and sex in making hiring and promotion decisions creates an inference of discrimination which would support the jury's unanimous verdicts that Sprint discriminated against Couch based on race and sex.

It is vital to the integrity and value of the jury system that the district court adhere to the high standard of review before setting aside jury verdicts. As the Eighth Circuit has concluded, "We are reminded of the universally adopted standard that judges must be *extremely guarded* in granting judgments as a matter of law after a jury verdict." *Ryther v. KARE 11*, 108 F.3d 832, 845 (8th Cir. 1997). In making its review, the district court must not weigh the evidence or consider the credibility of the evidence. *Fox v. T-H Continental Limited Partnership*, 78 F.3d 409, 413 (8th Cir. 1996). The court must view the evidence as follows:

> (1) consider the evidence in the light *most favorable* to [Couch], (2) assume that *all conflicts in the evidence* were resolved in favor of [Couch], (3) assume *as proved all facts* that [Couch's] evidence *tended to prove*, and (4) give [Couch] *the benefit of all favorable inferences that may reasonably be drawn* from the facts proved. (underlining emphasis added)

Nelson v. Boatmen's Bancshares, Inc., 26 F.3d 796, 800 (8th Cir. 1994). *See also Fox*, 78 F.3d at 413.

After nearly five days of trial, it was the unanimous conclusion of six jurors that Sprint discriminated against Couch based on his race and sex and retaliated against him when he complained of continuing discrimination.

The jury heard the evidence of Sprint's commitment to diversity. In light of this evidence, it is simply unbelievable that the district court would reject the unanimous decision of the jurors and set the verdicts aside.

However, in its opinion, the district court makes no mention of Couch's undisputed evidence of Sprint's commitment to diversity. Unbelievably, Judge Dean Whipple is completely silent as to the commitment, its express purpose and goal, and the actions taken by Sprint overall in Couch's department. If a person reads only the district court opinion, accepted completely by the Eighth Circuit, one would conclude the word "diversity" was never even mentioned in the trial.

At oral argument, the Eighth Circuit indicated that the diversity evidence would not be considered based on its conclusion in *Duffy v. Wolle*, 123 F.3d 1026 (8th Cir. 1997). David Duffy brought a claim of gender discrimination and raised the issue of diversity as additional circumstantial evidence of discrimination. However, the *Duffy* case involved evidence of the employer's "interest in obtaining a diverse pool of applicants". *Id.* at 1038. The Eighth Circuit concluded that such evidence did not support a finding of pretext. *Id.* Couch's evidence was not limited to the applicant pool. The undisputed evidence was that Sprint considered race and sex in making *hiring and promotion decisions*. The *Duffy* case is not controlling on the diversity evidence in Couch's case.

The evidence of diversity alone would provide a reasonable inference of discrimination to support the jury's unanimous verdicts. Diversity reigned supreme and the employment decisions made by Sprint make that

truth painfully obvious. With respect to Couch's claims, he was passed over for Manager National Agreements for a female – it was the sixth time he had been passed over for females. He presented credible evidence of his superior qualifications. Couch was passed over for Manager Corporate Agreements for a black male. The black male clearly did not have one of the stated requirements for the position – Sprint, not surprisingly, removed that requirement from the job description. Couch presented clear evidence of his vastly superior qualifications for the position. It is certainly a reasonable inference from the evidence that diversity ruled the day. The jury's verdicts were supported by the reasonable inference from the diversity evidence alone.

The district court's disregarding the important background evidence of diversity in this Title VII case may only be understood by Judge Whipple's comments in a prior case. In *Phillips v. ANR Freight Systems, Inc.*, 945 F.2d 1054 (8th Cir. 1991), the plaintiff made an offer of proof as to background evidence of other discrimination complaints against defendant. Judge Whipple heard the offer and rejected the evidence. His comments on the record are very significant in light of his actions in this case:

> I am not going to let them in, unproven allegations. Just because lawsuits are filed doesn't give credibility to them, especially in these cases. Those are Title VII cases. Congress created a nightmare because they entice anybody and everybody to file those things and entice any attorney to file them in the mere chance that if they win a dollar they can win attorney fees. So I think any Title VII cases ought to be looked

> at with suspicion to begin with because it's a crap shoot, which everybody engages in.

Id. at 1055. The bias of Judge Whipple has been stated on the record. This case discloses the danger of that bias in a case where critical background evidence is totally ignored by the judge.

The district court and the Eighth Circuit's decisions to ignore completely the probative evidence of race and sex based employment decisions based on Sprint's commitment to diversity cannot be tolerated by this Court. The Court should grant the writ to find that evidence of an employer's commitment to diversity which created race and gender based employment decisions is probative of discrimination and would support the jury's verdicts in this case.

3. Whether the court's disregard for the clear standard to be followed in granting judgment as a matter of law thereby setting aside unanimous verdicts in favor of Couch on all claims violates Couch's right to trial by jury.

In this case, the district court decided to submit the case to the jury and withhold a ruling on judgment as a matter of law. The district court and the Eighth Circuit violated Couch's right to jury when they swept the jury's verdicts away by ignoring the high standard for granting judgment as a matter of law.

The standard for the courts in determining whether to take a case from the jury or set aside the jury's verdict is well settled and very demanding.

> It is not the function of a court to search the record for conflicting circumstantial evidence in order to take the case away from the jury on a theory that gives equal support to inconsistent and uncertain inferences. The focal point of judicial review is the reasonableness of the particular inference or conclusion drawn by the jury. It is the jury, not the court, which is the fact-finding body. It weighs the contradictory evidence and inferences, judges the credibility of witnesses, receives expert instructions, and draws the ultimate conclusion as to the facts. The very essence of its function is to select from conflicting inferences and conclusions that which it considers most reasonable. [citations omitted] That conclusion, whether it relates to negligence, causation or any other factual matter, cannot be ignored. Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable.

Gallick v. Baltimore & Ohio Railroad Co., 372 U.S. 108, 114-115 (1963).

The standard is clear and well stated in the Eighth Circuit. In *Fox v. T-H Continental Limited Partnership*, 78 F.3d 409 (8th Cir. 1996), the Eighth Circuit discussed the standard for granting judgment as a matter of law.

> A motion for judgment as a matter of law presents a legal question to the district court, in the first instance, and to this Court on review: *"whether there is sufficient evidence to support a jury verdict."* (italics emphasis added)

Id. at 413 (*citing White v. Pence*, 961 F.2d 776, 779 (8th Cir. 1992)). *See also Parrish v. Immanuel Medical Center*, 92 F.3d 727, 731 (8th Cir. 1996). The court must not weigh the evidence or consider the credibility of the evidence. *Fox*, 78 F.3d at 413. The court must view the evidence as follows:

> (1) consider the evidence in the light *most favorable* to [Plaintiff], (2) assume that *all conflicts in the evidence* were resolved in favor of [Plaintiff], (3) assume *as proved all facts* that [Plaintiff's] evidence *tended to prove*, and (4) give [Plaintiff] *the benefit of all favorable inferences that may reasonably be drawn* from the facts proved. (italics emphasis added)

Nelson v. Boatmen's Bancshares, Inc., 26 F.3d 796, 800 (8th Cir. 1994). *See also Fox*, 78 F.3d at 413. A motion for judgment as a matter of law should be granted "*only when all the evidence points one way* and is susceptible of *no reasonable inferences* sustaining the position of the non-moving party" (underlining emphasis added). *Keenan v. Computer Associates Int'l*, 13 F.3d 1266, 1269 (8th Cir. 1994); *Nelson*, 26 F.3d at 800. Once the verdicts were returned, the district court was not free to set them aside because it disagreed with the jury's decision and its determination of the inferences from the evidence.

> This court has long held that "[i]n a jury case, where conflicting inferences reasonably can be drawn from evidence, it is the function of the jury to determine what inferences shall be drawn."

Ryther, 108 F.3d at 845 (*citing Anglen v. Braniff Airways*, 237 F.2d 736, 740 (8th Cir. 1956)). If reasonable jurors

could differ, the trial court's grant of judgment as a matter of law must be reversed.

Neither the Eighth Circuit nor the district court followed this well established standard. First, the Eighth Circuit expressly states that it agreed with the district court that there is no "substantial evidence" that Sprint's given reasons were a pretext for discrimination. App. 1-2. The standard for review does not require a finding that Couch produce "substantial evidence" to avoid judgment as a matter of law. Even Sprint admitted in its briefing to the Eighth Circuit that the standard does not require a finding of substantial evidence. The high standard for considering judgment as a matter of law requires that all the evidence point one way and be susceptible of no reasonable inference sustaining plaintiff's claims. *Keenan*, 13 F.3d at 1269. This well established standard is designed to *assure and protect* the value of the jury system. By its own admission, the Eighth Circuit followed the district court and applied a standard which makes it much easier for the court to grant judgment as a matter of law by looking for "substantial evidence." This error resulted in a disregard for the value of the jury's deliberations and verdicts. Both courts obviously failed to apply the proper standard in reviewing the evidence and considering judgment as a matter of law.

Second, the standard expressly prohibits the courts from weighing the evidence. The Eighth Circuit's erroneous review of the record looking for "substantial evidence" reveals that they did indeed weigh the evidence. In their opinion, the Eighth Circuit also refers to Couch's evidence as "meager". The Eighth Circuit obviously

engaged in weighing the evidence and, in further disregard for the standard, *examined only* the evidence which favored Sprint. For example, the Eighth Circuit recites that the evidence was that Couch renegotiated a contract "to Sprint's detriment". App. 2. The Eighth Circuit and the district court *do not look at any of Couch's evidence* which demonstrated that the contract had to be renegotiated and that greater detriment to Sprint would result from his failure to do so. The Eighth Circuit violated the well established standard by weighing the evidence and doing so in favor of Sprint.

The district court likewise overlooked the standard in reviewing the record. The district court, in rendering its opinion from the bench, referred to the "believable evidence" as being in favor of Sprint, hence clearly considering credibility and weighing the evidence. In its written opinion, the district court continued its disregard for the standard of review by examining and pointing only to the evidence supporting Sprint and weighing that evidence in favor of granting judgment as a matter of law. App. 12-31. The Eighth Circuit and the district court, in spite of their own recitations that the standard is well established, both completely failed to follow that standard.

In his brief to the Eighth Circuit, Couch recited eighteen (18) pages of facts found in the record which support his claims – eighteen (18) pages of facts which provide sufficient evidence to support the jury's verdicts on all claims. It is inconceivable that a court could conclude that all the evidence pointed one way and was susceptible of no reasonable inference in favor of Couch's claims. It is likewise inconceivable that the court could conclude that reasonable persons could not differ as to the evidence

presented. The only way the district court and the Eighth Circuit could reach such conclusions and grant judgment as a matter of law in spite of unanimous verdicts for Couch on all claims would be to ignore the standard and apply an improper standard which made it much easier to justify granting judgment as a matter of law – which is precisely what was done. By weighing the evidence, focusing on Sprint's evidence and requiring that "substantial evidence" be found to preclude judgment as a matter of law, the district court and the Eighth Circuit erroneously rejected the hours of deliberation by six persons in favor of the court's own opinions.

It is critical that the courts follow the proper standard for granting judgment as a matter of law after a jury has rendered its verdict. Ours is a system built on faith in the ability of a jury of peers to resolve legal disputes. The Eighth Circuit has stated that it places "great faith" in juries. *Forbes v. Arkansas Educational Television Comm.*, 93 F.3d 497, 501 (8th Cir. 1997). As Chief Judge Arnold stated:

> We have great faith in juries, and their desire and ability to follow instructions and make distinctions among the various issues put before them. . . . We do not know what our answer would have been if we had been sitting on the jury, *but that is not important*. There was conflicting evidence on this issue, and it could have gone either way. *Making decisions of this kind is exactly what juries are for.* (italics emphasis added)

Id. at 501. Even as the Eighth Circuit stated in *Ryther v. KARE 11*, 108 F.3d 832 (8th Cir. 1997):

> At the end of the day, perhaps most instructive is the United States Supreme Court's directive in *Lavender v. Kurn*, 327 U.S. 645, 653, 66 S.Ct. 740, 744, 90 L.Ed. 916 (1946):
>
> > *Only when there is a complete absence of probative facts to support the conclusion reached does a reversible error appear.* But where, as here, there is an evidentiary basis for the jury's verdict, *the jury is free to discard or disbelieve whatever facts are inconsistent with its conclusion.* And the appellate court's function is exhausted when that evidentiary basis becomes apparent, it being immaterial that the court might draw a contrary inference or feel that another conclusion is more reasonable. (emphasis added)
>
> This court continues to espouse the essence of *Lavender*. (italics emphasis added)

Id. at 845.

In spite of these statements of a high regard for the jury system, the Eighth Circuit concurred in the district court's decision to set aside the jury verdicts. The legal system demands that cases be decided by juries and hence the high standard for taking the case from a jury. The high standard protects the jury's deliberations and reasoned verdicts in the event the district court fails to grant judgment as a matter of law at the close of all the evidence. This high standard must be followed if faith in the jury system is to be well placed and have any meaning. As the Eighth Circuit has reasoned, "This demanding standard [for reviewing judgment as a matter of law]

reflects our concern that, if misused, judgment as a matter of law can invade the jury's rightful province." *Bevan v. Honeywell, Inc.*, 118 F.3d 603, 609 (8th Cir. 1997).

The district court and the Eighth Circuit obviously disregarded the high standard designed to protect the jury system and by doing so, violated Couch's right to trial by jury. The Court should grant the writ to reinforce the value of the jury system and their deliberations.

4. **Whether the district court and Eighth Circuit are applying inconsistent standards in ruling on judgment as a matter of law pursuant to Rule 50 by applying one standard when the motion is granted before submitting the case to a jury and a different standard when reviewing such a motion after the case is submitted to the jury and verdicts are returned.**

In this case, relying on Rule 50, the district court took Sprint's motion for judgment as a matter of law under advisement and submitted the case to the jury. Pursuant to Rule 50(b), Sprint renewed its motion after the verdicts were returned and the district court then granted judgment as a matter of law after the jury returned unanimous verdicts for Couch. In reaching its decision, the district court clearly analyzed the motion for judgment as a matter of law based on the burden shifting analysis set forth in *McDonnell Douglas v. Green*, 411 U.S. 792 (1973). App. 18-22. The district court, as affirmed by the Eighth Circuit, placed upon Couch the burden of proving pretext and looked for "substantial evidence" of that proof. Because the court relied on the burden shifting analysis,

it is obvious that the court weighed the evidence to see if the "substantial" standard had been met.

However, in *Parrish v. Immanuel Medical Center*, 92 F.3d 727 (8th Cir. 1996), the Eighth Circuit stated very clearly that there is only one issue before the court when considering judgment as a matter of law *after a jury verdict is returned*:

> A motion for judgment as a matter of law presents a legal question to the district court, in the first instance, and to this Court on review: "whether there is sufficient evidence to support a jury verdict."

Id. at 732. *See also Fox*, 78 F.3d at 413 (*citing White v. Pence*, 961 F.2d 776, 779 (8th Cir. 1992)).

In *Parrish*, the case was submitted to the jury with a verdict in favor of plaintiff on age discrimination. After trial, the defendant in *Parrish* made a post-trial motion for judgment as a matter of law. In considering the motion, the court discussed the burden shifting analysis set forth in *McDonnell Douglas v. Green*, 411 U.S. 792 (1973). However, in considering a motion for judgment as a matter of law after a jury verdict was returned, the court in *Parrish* clearly rejected the burden shifting analysis and set forth the following standard:

> On an appeal after trial, however, we focus our inquiry on the ultimate factual issue of whether the employer intentionally discriminated against the employee *rather than on the sufficiency of a party's showing at any particular stage of the McDonnell Douglas analysis. Morgan v. Arkansas Gazette*, 897 F.2d 945, 948 (8th Cir. 1990). [footnote omitted] (italics emphasis added)

Parrish, 92 F.3d at 733.

In *Parrish*, as discussed above, the court considered granting judgment as a matter of law in circumstances *procedurally identical* to that in this case. However, in *Parrish*, the Eighth Circuit expressly states that the *only issue* is whether there is sufficient evidence to support the jury's findings and that the burden shifting analysis should not be followed in considering judgment as a matter of law after a jury verdict has been returned. *Parrish*, 92 F.3d at 732-33. This is true because the jury is not required to find a *prima facie* case, a legitimate, non-discriminatory reason by defendant and then evidence of pretext in reaching its decision. The jury must only find that sex or race were determining factors in Sprint's employment decisions.

The district court's analysis in this case is in direct conflict with the standard for review set forth in *Parrish*. The district court carefully scrutinized the motion for judgment as a matter of law after verdicts had been returned under the burden shifting analysis. The Eighth Circuit accepted the district court's analysis and opinion and thereby approved a different standard of review for considering a motion for judgment as a matter of law after a jury verdict is returned – a standard based on the burden shifting analysis.

Because Rule 50 permits a district court to rule on judgment as a matter of law after a jury verdict, the Eighth Circuit currently has conflicting standards for considering said motions, one involving the *prima facie* case/ burden shifting analysis if the court rules *prior to* submitting the case, and another standard if the case is submitted and a verdict returned which considers only whether there was sufficient evidence to support a jury verdict,

which was stated in the *Parrish* case. These standards are inconsistent. The Court should grant the writ to set forth the correct standard to be followed in reviewing judgment as a matter of law under Rule 50(b).

CONCLUSION

For all of the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 97-1368WM

Jerry D. Couch, Appellant, v. Sprint Corp., Appellee.	* * * * * * * *	Appeal from the United States District Court for the Western District of Missouri

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Submitted: November 20, 1997
Filed: December 18, 1997

Before FAGG and HANSEN, Circuit Judges, and PIERSOL,* District Judge.

FAGG, Circuit Judge.

Jerry D. Couch appeals the district court's grant of Sprint Corporation's motion for judgment as a matter of law following trial on Couch's employment-based claims for gender and race discrimination and retaliation. We review the district court's grant of a motion for judgment as a matter of law under a well-established standard. Having carefully considered the record and the parties' submissions, we agree with the district court that there is

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*The Honorable Lawrence L. Piersol, United States District Judge for the District of South Dakota, sitting by designation.

no substantial evidence in the record tending to show the reasons given by those who promoted a woman and hired a black male for vacant positions instead of Couch, a white male, were a pretext for gender and race discrimination. We also agree with the district court that Couch's related retaliation claim cannot survive judgment as a matter of law. Couch worked as a contract negotiator for Sprint Corporation until his demotion after he amended a pager agreement to Sprint's detriment. Although Couch presented evidence that he complained to his supervisor about the woman's promotion (Couch believed he was better qualified for the position, not that he was denied for discriminatory reasons), there is no evidence tending to show that the head of his department (who preferred termination but deferred to Couch's supervisor's recommendation "to put [Couch] where he couldn't cause as much damage") knew about Couch's complaint until after the demotion decision was made. Like the district court, we conclude Couch's meager evidence would not permit a jury reasonably to find there was any connection between Couch's promotion-related complaint and his demotion for poor business judgment. Because the controlling law is clear, our review satisfies us that an opinion would have no precedential value in this fact-intensive case. We agree with the district court's analysis and conclude the district court correctly granted the motion for judgment as a matter of law. We thus affirm the judgment without further discussion. *See* 8th Cir. R. 47B.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI WESTERN DIVISION

JERRY D. COUCH, Plaintiff,	)	
v.	)	No. 95-0675-CV-W-1
SPRINT CORPORATION, Defendant.	)	(Filed March 25, 1997)

ORDER

I. Procedural Background

Plaintiff Jerry Couch, a white male, filed this employment discrimination lawsuit based on three theories of liability: (1) Sprint discriminated against him due to his race and (2) due to his gender by failing to promote him, and (3) Sprint retaliated against him by demoting him. The lawsuit was brought under both Title VII and the Missouri Human Rights Act. All three of the claims involved employment decisions made in Sprint's Material and Service Management department.

At the close of all of the evidence at trial, Defendant Sprint Corporation ("Sprint") filed a motion for judgment as a matter of law on Couch's three theories of liability. The Court took the motion under advisement. The Court submitted the matter to the jury subject to a later determination of the legal questions raised in Sprint's motion. *See* Fed. R. Civ. P. 50(b). The jury returned a verdict in favor of Couch on all three theories, prompting Sprint to renew its motion for judgment as a matter of law. Pursuant to Rule 50(b), Sprint joined its renewal motion for

judgment as a matter of law with a Rule 59(a) motion for a new trial. On Friday, October 25, 1996, the Court heard arguments on Sprint's motion.

After careful consideration of Sprint's written motion, Couch's opposition, and the arguments of counsel, the Court granted Sprint's motion for judgment as a matter of law and denied its alternative motion for new trial. On November 14, 1996, Sprint filed a motion under Rule 59(e) or Rule 60(b), requesting the Court to reconsider the denial of its request for a new trial. In an Order dated December 26, 1996, the Court set forth its reasoning for granting Sprint's motion for judgment as a matter of law. In the same Order, the Court granted Sprint's motion to reconsider its denial of Sprint's motion for a new trial and requested further briefing. The matter is now ripe for decision.

II. Standard for Granting New Trial

Rule 59(a) authorizes the Court to grant a new trial in some circumstances. Rule 50(c) instructs the Court to conditionally rule on a party's motion for new trial when submitted as an alternative to a motion for judgment as a matter of law:

> If the renewed motion for judgment as a matter of law is granted, the court shall also rule on the motion for a new trial, if any, by determining whether it should be granted if the judgment is thereafter vacated or reversed, and shall specify the grounds for granting or denying the motion for new trial . . .

Fed. R. Civ. P. 59(c). Accordingly, Rule 59(c) requires the Court to grant or deny the motion for a new trial and specify grounds for its decision.

Federal Rule of Civil Procedure 59 permits a district court to grant or deny a new trial based on its appraisal of the fairness of the trial and the reliability of the jury's verdict. *Gray v. Bicknell*, 86 F.3d 1472, 1480 (8th Cir. 1996). "A new trial is appropriate when the first trial, through a verdict against the weight of the evidence, an excessive damage award, or legal errors at trial, resulted in a miscarriage of justice." *Id.*

III. Discussion

In this case, the Court is convinced that the jury verdict was against the weight of the evidence and that permitting the verdict to stand will result in a miscarriage of justice. The Court finds that Couch's emphasis on evidence that the Court should have excluded resulted in an unreliable jury verdict. The evidence at issue is the statistical or empirical data offered by Couch to show the gender and race of those employees who Sprint had recently hired or promoted.

The dispute about this evidence between the parties before and during trial focused on the applicability of *Estes v. Dick Smith Ford, Inc.*, 856 F.2d 1097, 1103 (8th Cir. 1988). *See, e.g.*, Tr. Vol. I, at 7-25 (pre-trial conference discussing motion in limine to exclude certain evidence). In *Estes*, the Eighth Circuit Court of Appeals held that a district court had abused its discretion in an employment discrimination case when, in a pre-trial ruling, it had

categorically excluded some items of "background evidence." The exclusion included workforce statistics, *Estes*, 856 F.2d at 1103-04, prior acts of discrimination, *id.* at 1104, and several racial comments made by a manager, *id.* The court of appeals reasoned that the effects of blanket evidentiary exclusions could be unfairly damaging in employment discrimination cases, in which plaintiffs must face the difficult task of persuading the fact-finder to disbelieve an employer's account of its own motives. *Id.* The court took particular note of the timing of the district court's ruling. It found that the district court's blanket exclusion was particularly egregious because it was made before trial "rather than during the development of the plaintiff's case before the jury." *Id.* at 1103.

Although, in *Estes*, the Eighth Circuit Court of appeals cautioned that background evidence should not be subject to blanket evidentiary exclusions, it has also indicated that neither can such evidence be subject to blanket admissibility. In *Callanan v. Runyun*, 75 F.3d 1293 (8th Cir. 1996), the court stated that "[t]he evidence . . . must assist in the development of a reasonable inference of discrimination within the context of each case's respective facts." *Id.* at 1298 (quoting *Bradford v. Norfolk S. Corp.*, 54 F.3d 1412, 1419 (8th Cir. 1995)); *see also Kunzman v. Enron Corp.*, 941 F. Supp. 853, 864 (N.D. Iowa 1996) (collecting cases). Accordingly, "background evidence" that is facially nondiscriminatory and fails to suggest discrimination, or which is so unreliable as to be insufficient to assist in the development of a reasonable inference of discrimination within the factual context, should be excluded as either irrelevant under Federal Rule of Evidence 401 or unfairly prejudicial under Federal Rule

of Evidence 403. Consequently, prior to introducing such evidence, the plaintiff must demonstrate, by offer of proof, that it meets the criteria of admissibility stated in *Callanan v. Runyun, i.e.*, that the evidence will assist in the development of a reasonable inference of discrimination. *Kunzman*, 941 F. Supp. at 865 (citing *Callanan*, 75 F.3d at 1298; *Bradford*, 54 F.3d at 1419); *see Bruno v. W.B. Saunders Co.*, 862 F.2d 760, 774-75 (3d Cir. 1989) (Greenberg, J., dissenting) (explaining the role of the judge and jury in evaluating statistical evidence in employment discrimination cases).

At trial in this case, the Court did not demand such an offer of proof from Couch when he sought to introduce an assortment of empirical background evidence, including what may be loosely identified as statistical evidence of Sprint's promotional and hiring practices. Although, for the reasons set forth in *Estes*, the Court's denial of Sprint's pre-trial motion to categorically exclude this evidence was correct, this decision should have been reexamined once the trial began to unfold. In so heavily relying on *Estes* to permit Couch every opportunity to prove his case, the Court inadvertently neglected *Callanan*, which led to the introduction of distorted and unfairly prejudicial "statistical" evidence.

The Court does not suggest, however, that reliable statistical evidence should be excluded in employment discrimination cases – including disparate treatment cases. Statistical evidence is often admissible, not to mention powerful, evidence of intent to discriminate in disparate treatment cases. *See Estes*, 856 F.2d at 1103-04; 1

BARBARA LINDERMAN & PAUL GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 736-37, 1687-1737 (3d ed. 1996) [hereinafter LINDERMAN & GROSSMAN]. Comparative statistical data which might suggest that equal employment opportunity was not the employer's prevailing policy has some probative value for the question of whether discrimination has motivated a particular employee's treatment. *Estes*, 856 F.2d at 1103.

Although statistics may sometimes be used to prove intent, their usefulness depends upon all of the surrounding facts and circumstances. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 805 n.19, 93 S. Ct. 1817, 1826, 36 L. Ed.2d 668 (1973). Statistical evidence should not be admitted in a disparate treatment case if it unfairly diverts a jury's focus from the ultimate issue: whether the particular plaintiff was a discrimination victim, not whether others in the company were. LINDERMAN & GROSSMAN, *supra*, at 737; *see also Bazemore v. Friday*, 478 U.S. 385, 400, 400 n.10, 106 S. Ct. 3000, 3009 n.10, 92 L. Ed.2d 315 (1986) (Brennan, J., joined by all other members of the Court, concurring in part) (stating that, although defects in statistical studies usually affect only the statistics' probative value and not their admissibility, statistics that are so incomplete will be inadmissible as irrelevant); *Hutson v. McDonnell Douglas Corp.*, 63 F.3d 771, 778 (8th Cir. 1995) ("statistics, to be meaningful indicators of pretext, [must] evaluate the treatment of comparable employees . . . '[C]ompany-wide' statistics . . . have relatively little relevance to determining discriminatory animus of the specific manager who made the ultimate decision"); *Callanan*, 75 F.3d at 1298 ("The evidence . . . must assist in the

development of a reasonable inference of discrimination within the context of each case's respective facts.").

Accordingly, if a proponent's offer of proof exposes that the statistical evidence is insufficient to assist in the development of a reasonable inference of discrimination within the context of the case's respective facts, the evidence should be excluded as irrelevant or unfairly prejudicial. *See* Fed. R. Ev. 401, 402, 403; *Goetz v. Farm Credit Services*, 927 F.2d 398, 405-06 (8th Cir. 1991) ("Statistical evidence has some probative value in determining whether the decision to terminate an employee was based on the employee's age. However, the statistical evidence must be of a kind and degree sufficient to raise the inference that the employment decision was based upon an impermissible factor such as age"); David W. Peterson, *Employment Law: The Big Case – The Use of Experts in Big Cases*, SA92 ALI-ABA 677, 687 (1996) (describing the appropriate use of statistics).

In this case, counsel for Couch repeatedly referred to empirical data – and charts demonstrating those data – of Sprint's hiring and promotional practices. *See, e.g.*, Tr., vol. II, at 207, *et seq.* (testimony of Lauren Wright). The data and charts purported to show the race and gender of the employees who had been hired and promoted within a relevant time period. Couch introduced it to show that more women and non-whites had been promoted or hired than had been white men. The evidence, however, was distorted. It included positions and people that were not similarly-situated to Couch. *See* Tr., vol. II, at 73-74, 120-26 (discussing problems with Couch's empirical data). Moreover, Couch failed to use an expert witness to

evaluate the data.[1] Consequently, confusion consistently attended its use. *See id.* Furthermore, without an expert – and with the accompanying confusion – the Court was precluded from making any informed judgment about admissibility, *i.e.*, about whether the data even suggested discrimination. *See* Peterson, *supra*, at 687 (describing the appropriate use of statistics).

As the trial progressed, it became apparent that the jury had been unfairly misled by the "statistical" data. The Court is convinced that the jury's confusion led to an unreliable verdict.[2] As a result, the Court will grant Sprint a new trial if its Order granting Sprint's motion for judgment as a matter of law is reversed.

IV. ORDER

Based on the foregoing, it is hereby ORDERED that the Court's previous ruling denying Sprint's motion for a new trial in the alternative to its motion for judgment as a matter of law is VACATED. It is further

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[1] By contrast, the workforce statistics at issue in *Estes* were much more sophisticated than those presented by Couch, and doubtlessly evaluated before the jury by expert witnesses. *See Estes*, 856 F.2d at 1103-04. Consequently, the Eighth Circuit had "no reason to assume that Estes's explanation of the data [was] less plausible than Ford's." The same is not true in this case.

[2] From *Hutson v. McDonnell Douglas Corp.*, 63 F.3d 771, 778 (8th Cir. 1995) and other cases cited herein, it should be clear to Plaintiff why the empirical data at issue did not support his opposition to Defendant's motion for judgment as a matter of law, as Plaintiff continues to assert in his brief opposing a new trial.

ORDERED that Sprint's motion for a new trial under rules 59 and 50 is GRANTED.

/s/ Dean Whipple
Dean Whipple
United States
District Judge

Date March 25, 1997

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI WESTERN DIVISION

JERRY D. COUCH, Plaintiff,	)	No. 95-0675-CV-W-1
v.	)	(Filed Dec. 26, 1996)
SPRINT CORPORATION, Defendant.	)	

MEMORANDUM AND ORDER

I. Procedural Background

Plaintiff Jerry Couch, a white male, filed this lawsuit based on three theories of liability: (1) Sprint discriminated against him due to his race and (2) due to his gender by failing to promote him, and (3) Sprint retaliated against him by demoting him. The lawsuit was brought under both Title VII and the Missouri Human Rights Act ("MHRA"). All three of the claims involved employment decisions made in Sprint's Material and Service Management ("M&SM") department.

At the close of Plaintiff's evidence at trial, Sprint moved for judgment as a matter of law on Couch's claim for punitive damages. In a bench ruling, the Court granted Sprint's motion and refused to submit the issue to the jury. At the close of all the evidence, Defendant Sprint Corporation ("Sprint") filed a motion for judgment as a matter of law on Plaintiff's three theories of liability. The Court took the motion under advisement. Pursuant to Rule 50(b), the Court submitted the matter to the jury subject to a later determination of the legal questions

raised in Sprint's motion. The jury returned a verdict in favor of Plaintiff, prompting Sprint to renew its motion for judgment as a matter of law. On Friday, October 25, 1996, the Court heard arguments on Sprint's motion. After careful consideration of Sprint's written motion, Plaintiff's opposition, and the arguments of counsel, the Court granted Defendant's motion for judgment as a matter of law and denied its alternative motion for new trial. This Order states in further detail the reasons for the Court's holding.

II. Standard for Granting Judgment as a Matter of Law

Judgment as a matter of law is appropriate when the evidence points one way and is susceptible of no reasonable inference sustaining the position of the nonmoving party. *White v. Pence*, 961 F.2d 776, 779 (8th Cir. 1992). Although every reasonable inference is to be drawn in the plaintiff's favor, an inference is reasonable only if it can be drawn from the evidence without resorting to speculation. *Frieze v. Boatmen's Bank of Belton*, 950 F.2d 538, 541 (8th Cir. 1991); *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252, 106 S. Ct. 2505, 2512, 91 L.Ed.2d 202 (1986) (stating that, upon motion for summary judgment or motion for directed verdict, a judge must ask "whether a fair-minded jury could return a verdict for the plaintiff on the evidence presented" and that "a mere existence of a scintilla of evidence" in support of the plaintiff's position will be insufficient).

III. Factual Background

The evidence adduced at trial established that Jerry Couch began his employment with Sprint in 1986. Between 1986 and 1989, Couch held a number of positions, always reporting to white males. Although Couch performed satisfactorily from 1986 until 1990, his evaluations consistently reflected his need to improve his leadership and communication skills.

In 1990, Couch began working under Mike McCormick, a white male, in the National Agreements Department of the M&SM division. When Couch joined the department as a level 75 National Agreements Negotiator,[1] two women were already working in the group – Sara Miller, a level 76 Senior Negotiator, and Sara Shepherd, a level 75 Negotiator. During the three years that McCormick supervised these three individuals, Plaintiff consistently earned ratings of "3" or "fully satisfactory" while Shepherd and Miller almost always earned ratings of "2" or "above expectations." Plaintiff's evaluation forms continued to indicate a weakness in leadership and communication skills. By contrast, Shepherd's and Miller's evaluations indicated that leadership and communication skills were strengths.

In 1992, McCormick promoted Shepherd from a level 75 National Agreements Negotiator to a level 76 Senior Negotiator. McCormick testified that he had the option of

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[1] Positions at Sprint are typically numerically classified with higher numbers corresponding to higher ranking positions.

promoting both Shepherd and Plaintiff at that time. However, McCormick further testified that he promoted only Shepherd, because, unlike Plaintiff, she had consistently shown outstanding skills and an ability to exceed the minimum requirements of the position.

In September 1993, Lauren Wright became the Assistant Vice President of Finance in charge of the Materials and Service Management Department. Both she and John Meyer testified that one of her goals in this new position was to improve business operations and gain greater acceptance and usage of the Department by the internal customer base. After spending her first three months evaluating the strengths of the employees in the department, Wright announced a major reorganization in January 1994.

As part of the reorganization, McCormick was promoted to a director position, as was Dave Fogelman, another white male employed at Sprint. Benn Sledge, a black male, became the director responsible for the National Agreements Group.

With his promotion to a director position, McCormick's Manager, National Agreements position became open. In June 1994, Miller was, with McCormick's recommendation, named Manager of the National Agreements department. In this position, Miller supervised both Sara Shepherd and Couch, as well as two new National Agreements negotiators who had been brought into the department.

In October 1994, the position of Manager, National Agreements became available. Four individuals applied for the position, and two – Plaintiff and Shepherd – were

interviewed. Benn Sledge testified that he chose Shepherd to fill the vacancy after consulting with McCormick who had supervised both individuals for three years. McCormick indicated to Sledge that Shepherd had consistently outperformed Plaintiff and that her strengths – including, leadership, judgment, and decisiveness – were important for this managerial position. Sledge, having interviewed and worked with both candidates, concurred with McCormick and promoted Shepherd to the position of Manager, National Agreements.

After Sprint announced Shepherd's promotion to Manager, National Agreements, Plaintiff complained to Sledge that he should have been promoted. During this conversation, Plaintiff compared and contrasted his experience and background with that of Shepherd and argued that he was better qualified for the position. Plaintiff did not specifically state that he believed that Shepherd had gotten the job because of her gender or that he had been denied the promotion because he was a man.

The next month, the position of Manager, Corporate Agreements became available. Sprint maintained a formal application procedure, which required interested parties to submit a Job Interest Request ("JIR") form to be considered for posted positions. Plaintiff testified that submission of a JIR is a well-known procedural prerequisite to applying for a posted position at Sprint and that he knew of no internal candidate who received a posted position without first filling out a JIR.

Nonetheless, Plaintiff did not submit a JIR for the Manager, Corporate Agreements position. Instead, Plaintiff testified that he told Sledge that he would like to be

considered for the position. At trial, Sledge acknowledged the conversation but stated that he assumed that if Plaintiff was interested in a particular position, he would have applied for the position by submitting a JIR. Sledge further testified that an identical Manager, Corporate Agreements position had been available less than four months earlier and was awarded to Ted Freese, a white male. Ultimately, the new Manager, Corporate Agreements position was awarded to Isaiah Brown, a black male and former manager for Hallmark Cards, who applied and interviewed for the position.

During this same time period, Plaintiff was renegotiating a contract with Air Signal, Sprint's national pager provider. Sprint had negotiated a contract with Air Signal under which Sprint employees were able to receive an unlimited number of pages for a flat fee. In the summer of 1994, Air Signal contacted Plaintiff expressing displeasure with the current terms of the contract. Air Signal complained that a relatively small number of Sprint employees were receiving a large number of pages on a daily basis resulting in unexpected costs to Air signal. Air Signal requested that Plaintiff renegotiate the contract to put a cap on the number of pages each Sprint employee could receive for free and establishing a per page cost for pages exceeding the predetermined ceiling. Air Signal's suggestion provoked complaints from several Sprint departments. Lee Jobe, a Sprint employee based in Atlanta, testified that he telephoned Plaintiff directly to protest any proposed change to the contract because the increased cost would force his department to exceed its budget. Plaintiff orally assured Jobe that he would take no action without Jobe's input. Nonetheless, the evidence

showed that Couch amended the contract without affording Jobe an opportunity to comment on the change. When Jobe learned of the change, he contacted both Lauren Wright and Benn Sledge to complain.

Thereafter, Sledge, Angela Webster, Sara Miller, and Sara Shepherd investigated the amendment. Sprint witnesses testified that the investigation revealed that Plaintiff had exercised poor business judgment in agreeing to the amendment. Moreover, although Air Signal had claimed economic hardship as the basis for the amendment, Air Signal's general manager, Colleen Hodge, testified that the renegotiated deal actually resulted in additional profit to Air Signal. Following the investigation, Plaintiff was demoted from a level 75 to a level 74.

IV. Discussion

A. Race Discrimination.

Plaintiff's race discrimination claim arose out of the promotion of Isaiah Brown to Manager, Corporate Agreements in November 1994. Plaintiff alleged that he was more qualified than Brown, who is a black male.

To prove a *prima facie* case of race discrimination under Title VII of the MHRA,[2] Plaintiff must establish four elements: 1) that he belongs to a protected class

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[2] The Missouri Supreme Court has held that discrimination claims brought under the Missouri Human Rights Act are analyzed the same as claims brought under Title VII. *Midstate Oil v. Missouri Comm'n on Human Rights*, 679 S.W.2d 842, 845-86 (Mo. 1984). Consequently, the state and federal claims can be considered jointly.

under Title VII, such as race; (2) that he applied and was qualified for a job for which the employer was seeking applicants; (3) despite his qualifications, he was rejected; and (4) that after his rejection, the position remained open or was filled by a member of a different race. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973). Plaintiff established a *prima facie* case.[3] The burden then shifted to Sprint, which was required to rebut the presumption of discrimination. In this case, Sprint rebutted the presumption of discrimination by producing evidence that the failure to promote Couch was due to a legitimate, nondiscriminatory reason. First, Sprint presented evidence that Isaiah Brown was qualified. Both Sledge and Wright testified that Brown's proven leadership skills at his previous position with the military and management position at Hallmark Cards were instrumental in their decision to hire him. Second, Sledge testified that, because Couch did not fill out a JIR form to apply for the Manager, Corporate Agreements position, Sprint was not aware that he desired to be considered for the position. Plaintiff testified that he did not fill out a JIR even though he knew Sprint had a written policy that a JIR had to be submitted for any posted position. He further testified that he knew of no other Sprint employee who ever received a posted position at Sprint without first completing a Job Interest Request form ("JIR").

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[3] The Court's pre-trial Order, dated September 12, 1996, addressing Defendant's motion for summary judgment analyzes the effect of Couch's failure to apply on his ability to establish a *prima facie* case of discrimination.

Once Sprint met its burden of demonstrating a legitimate, non-pretextual reason for failing to promote Couch, Couch was required to demonstrate the existence of evidence of some additional facts that would allow a jury to find that Sprint's proffered reason was a pretext and that the real reason for its action was intentional discrimination. *See St. Mary's Honor Center v. Hicks*, 113 S. Ct. 2742, 2747, 125 L.Ed.2d 407 (1993). Couch failed to do so. The bulk of Plaintiff's evidence sought to suggest that, because Sledge was black, his participation in the hiring of another black male was evidence of discrimination against Couch. The claim is insufficient as a matter of law for two reasons. First, a black supervisor's decision to hire an employee who is also black is hardly probative evidence of intent to discriminate against Couch. Second, the uncontradicted evidence showed that Sledge was not the sole decision maker in hiring Brown. The evidence demonstrated that Wright, McCormick, Miller, and Shepherd also interviewed Brown and concurred in the decision to hire him. Thus, the evidence merely demonstrated that a black man was hired into a position that Plaintiff desired but for which he did not formally apply. Plaintiff has failed to set forth sufficient affirmative evidence demonstrating that a factual issue of pretext and the ultimate issue of intentional discrimination exists.

Nevertheless, Plaintiff argues the Court's pre-trial Order, dated September 12, 1996, addressing Defendant's motion for summary judgment determined that the evidence supported a reasonable inference of discrimination. Plaintiff misconstrues that Order. There, the Court expressly noted that Defendant's motion argued only that Plaintiff failed to satisfy all elements of a *prima facie* case

because he failed to apply for the position. *See Couch v. Sprint*, No. 95-0675-CV-W-1, Order of September 12, 1996, at 5 n.3. The Court explained that it would rarely grant summary judgment based solely on the claim that a plaintiff failed to satisfy an element of a *prima facie* case of discrimination.[4] In the Eighth Circuit, a plaintiff need introduce only "some" evidence supporting each element to make out a *prima facie* case, which then shifts the burden of production to the employer. *Landon v. Northwest Airlines, Inc.*, 72 F.3d 620, 624 (8th Cir. 1995) (stating that, while plaintiff's evidence "would not require a reasonable juror to return a verdict in favor" of the plaintiff, it was sufficient to satisfy the minimal requirement of "some" evidence to establish a *prima facie* case). In the pre-trial Order, the Court found that Couch's conversation with Sledge, during which Couch indicated that he desired to be considered for the Manager, Corporate Agreements position, was sufficient to support the *prima*

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[4] Essentially, Sprint asked the wrong question in its pre-trial motion for summary judgment. Discrimination suits involve three steps. First, a plaintiff must establish a *prima facie* case of discrimination. Establishing a *prima facie* case is a minimal burden because it is intended to force the employer to produce evidence of a legitimate reason for its action – evidence which is very difficult to procure without this procedural prompting. Once (1) the *prima facie* case is established, and (2) the employer proffers a legitimate reason for its employment decision, then the suit moves to the third step and the focus again switches to the plaintiff. At this point, the plaintiff bears the burden of demonstrating the employer's intent to discriminate. The pre-trial Order addressed only the first step. This Order addresses the third step, however, and finds Plaintiff's evidence of discrimination insufficient as a matter of law.

facie case. *See, e.g., Chambers v. Wynne School District*, 909 F.2d 1214, 1217 (8th Cir. 1990) (indicating that a *prima facie* case is sometimes established even though Plaintiff never formally applied for the disputed position); *Johnson v. Minnesota Historical Society*, 931 F.2d 1239, 1242-43 (8th Cir. 1991) (indicating that elements of a *prima facie* case must be flexible). The Court expressly reserved its judgment, however, on whether Plaintiff's evidence, including the *prima facie* case, supported a reasonable inference of intent to discriminate. The Court reaches that question now and finds that Couch's evidence, as a matter of law, fails to support a reasonable inference of discrimination.

B. Gender Discrimination

Plaintiff alleged that Sprint promoted Sara Shepherd to Manager, National Agreements because of her gender. Each of Sprint's witnesses testified that Shepherd's promotion was based on her superior skills and qualifications and had nothing to do with her gender. Plaintiff met his burden of introducing "some" evidence to satisfy each element of the *prima facie* case.

The burden of production then shifted to Sprint to proffer a legitimate, non-discriminatory reason for promoting Shepherd. Sprint satisfied this burden. Plaintiff admitted that Shepherd met the qualifications stated on the job description for the Manager, National Agreements position at the time of her promotion. Shepherd's qualifications included a Bachelor of Science in Business Administration, over ten years of procurement experience, and approximately four years of national agreements experience. In addition, Shepherd consistently

earned job performance evaluations that were superior to those of Plaintiff, and she had been promoted to senior negotiator by McCormick, a white male, prior to the time Wright or Sledge came to the department. Shepherd's qualifications were confirmed by her superiors. Mike McCormick, Benn Sledge, and Lauren Wright all testified that Shepherd was more qualified for the Manager, National Agreements position than Plaintiff and had superior communication and leadership skills. They testified that these skills were paramount given the nature of the Manager position. By contrast, McCormick testified that Plaintiff lacked the communication and leadership skills necessary for a management position. Miller, who previously held the position and who supervised both Shepherd and Plaintiff, also stated that Shepherd's skills were more suited to the position. All of Plaintiff's supervisors testified that Plaintiff lacked the leadership and communication skills necessary for a management position.

The burden of persuasion then rested on Plaintiff to demonstrate that Sprint intentionally discriminated against Couch. To succeed on his gender discrimination claim, Plaintiff needed to prove that Sprint's stated reasons for promoting Sara Shepherd were not true but merely pretextual and that Sprint's actual motive for the decision was intentional discrimination based on gender. *See Rothmeier v. Investment Advisors, Inc.*, 85 F.3d 1328, 1335 (8th Cir. 1996) (upholding district court's finding that the evidence was insufficient for a reasonable trier of fact to infer discrimination even though the plaintiff may have created a factual dispute as to the issue of pretext);

see also Piantadia v. Wyman Center, Inc., 927 F. Supp. 1226, 1243 (E.D. Mo. 1996).

Plaintiff failed, as a matter of law, to meet his burden. Neither Title VII nor the MHRA eliminates an employer's right to make a business decision regarding its employees, absent intentional discrimination. *Piantadia*, 927 F. Supp. at 1242. "While an employer's judgment may seem poor or erroneous to outsiders, the relevant question is simply whether the given reason was pretext for illegal discrimination." *Clay v. Hyatt Regency Hotel*, 724 F.2d 721, 725 (8th Cir. 1984); *accord Ruby v. Springfield R-12 Public School Dist.*, 76 F.3d 909, 912 n.7 (8th Cir. 1996) ("We note that 'our inquiry is limited to whether the employer gave an honest explanation of its behavior . . . rather than to weigh the wisdom of any particular employment decision.' ") (citations omitted); *Hutson v. McDonnell Douglas Corp.*, 63 F.3d 771, 781 (8th Cir. 1995) ("the employment discrimination laws have not vested in the federal courts the authority to sit as super-personnel departments reviewing the wisdom or fairness of the business judgments made by employers, except to the extent that those judgments involve intentional discrimination"). The evidence at trial was susceptible to only one interpretation – Sprint's management personnel exercised business judgment and promoted Sara Shepherd to Manager, National Agreements because of her superior qualifications and not because of her gender. No reasonable jury could find otherwise.

C. Retaliation

Sprint demoted Couch from a level 75 to a level 74 position in December 1994. Couch argued that he was demoted in retaliation for his complaint to Sledge, which objected to Sara Shepherd's promotion to the position of Manager, National Agreements in October 1994. Sprint, on the other hand, argued that it demoted Couch for exercising poor judgment and failing to seek supervisory approval before amending the pager agreement with Air Signal.

A *prima facie* case of retaliation consists of three elements: (1) statutorily protected activity; 2) adverse employment action; and 3) a causal connection between the adverse employment action and the protected activity. *Evans v. Kansas City, Mo. School Dist.*, 65 F.3d 98, 100 (8th Cir. 1995). In this case, Plaintiff testified that he never told any Sprint manager or employee that he believed he had been denied a promotion for discriminatory reasons. Couch's only allegation of protected activity occurred when Plaintiff complained on one occasion to Benn Sledge that he though he was better qualified than Sara Shepherd for a promotion.[5] Thus, Couch's retaliation claim turns on that incident. The Court finds that the

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[5] Couch's deposition testimony that discusses his complaint to Sledge approximates Couch's testimony at trial:

> Well, I spoke about her. I didn't specifically state she was a white female, et cetera, I spoke about her. I pointed out in detail the variances and the differences in her qualifications and experience between myself and Sara Shepherd.

Dep. of Jerry D. Couch, Parag. 9-20, at 190.

claim fails as a matter of law because Couch did not establish a causal connection between his demotion and his complaint to Sledge about Sara Shepherd's promotion.[6]

The evidence established that Couch complained to Sledge about Shepherd's promotion. The evidence also demonstrated that, two months following the complaint, Sprint suspended Couch without pay after he renegotiated a pager contract with Air Signal. Wright, Jobe, and Sledge testified that Sprint believed that Couch's decision was an exercise of extremely poor business judgment that damaged relations between Jobe's department, which was an internal client, and the M&SM department. They further testified that the renegotiation of the Air Signal contract was the catalyst for Couch's demotion. Lauren Wright, the head of the group, testified that she instructed Sledge to fire or demote Couch because of his exercise of poor judgment in renegotiating the contract. Plaintiff produced no evidence that Wright had any knowledge of Couch's complaint to Sledge about Sara Shepherd's promotion. Moreover, the uncontradicted evidence showed that Sara Shepherd, Sara Miller, and Angela Webster were each consulted regarding the appropriate disciplinary action to be taken against Couch. Plaintiff produced no evidence that any of these individuals knew that Plaintiff complained to Sledge regarding

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[6] Because the Court finds that Plaintiff failed to establish a causal connection between the protected activity and the demotion, the Court does not address whether the language of Couch's complaint to Sledge could be reasonably construed as a complaint of gender discrimination sufficient to support a reasonable inference of retaliation.

Sara Shepherd's promotion. In short, Plaintiff offered no evidence that Sledge told anyone that Plaintiff complained about Shepherd's promotion. Furthermore, Plaintiff produced no evidence that his complaint to Sledge tainted Sledge's assessment of Plaintiff's skills. Based on Couch's meager evidence, a reasonable jury could not find that Plaintiff's complaint played any role in Plaintiff's demotion without resorting to speculation. Consequently, judgment as a matter of law is appropriate.

D. Punitive Damages

To collect punitive damages under Title VII, as amended by the Civil Rights Act of 1991, Plaintiff was required to show that Sprint engaged in discrimination "with malice or reckless indifference to [his] federally protected rights." 42 U.S.C. § 1981a(b)(1). *Varner v. National Supermarkets*, 94 F.3d 1209, 1214 (8th Cir. 1996). To collect punitive damages under the MHRA, Plaintiff was required to show that Sprint's conduct was "outrageous because of its evil motive or reckless indifference to [Plaintiff's rights]." *Id.*; *Kientzy v. McDonnell Douglas Corp.*, 990 F.2d 1051, 1062 (8th Cir. 1993); *accord Nelson v. Boatmen's Bancshares, Inc.*, 26 F.3d 796, 804 (9th Cir.1994) (to recover punitive damages, Missouri law requires showing of conduct that would "shock the conscience and cause outrage"); *Turic v. Holland Hospitality, Inc.*, 85 F.3d 1211, 1216 (6th Cir. 1996) (finding that an employer's discriminatory decision to discharge an employee for considering having an abortion was duplicitous and lacking in empathy but did not support a punitive damages award under Civil Rights Act of 1991); *Pandazides v. Virginia Bd. of Educ.*, 13 F.3d 823, 830 n.9 (4th Cir. 1994) (a

showing of more than intentional discrimination is required to recover punitive damages under Civil Rights Act of 1991). The evidence did not support a finding that Sprint was malicious or recklessly indifferent to Couch's right to require his employer to assess his work performance and make employment decisions without regard to race or gender. At the close of Plaintiff's evidence, it was clear that, before making an employment decision, Sprint supervisors routinely consulted with those familiar with Couch's performance. The evidence did not demonstrate reckless or malicious decisions contaminated by consideration of race and gender.

E. New Trial

Pursuant to Rule 50(b), Sprint joined its renewal motion for judgment as a matter of law with a Rule 59(a) motion for a new trial. In its bench ruling, the Court denied the motion for a new trial. On November 14, 1996, Sprint filed a motion under Rule 59(e) or Rule 60(b), requesting the Court to reconsider. Sprint asserts that the Court did not properly consider the motion and did not specify the grounds for denying the Rule 59(a) motion as required by Rule 50(c).

1. Rule 50(c): Conditional Ruling on Motion for New Trial When Motion for Judgment as a Matter of Law is Granted

Rule 59(a) authorizes the Court to grant a new trial in some circumstances. Rule 50(c) instructs the Court to conditionally rule on a party's motion for new trial when

submitted as an alternative to a motion for judgment as a matter of law:

> If the renewed motion for judgment as a matter of law is granted, *the court shall also rule on the motion for a new trial*, if any, by determining whether it should be granted if the judgment is thereafter vacated or reversed, and *shall specify the grounds* for granting or denying the motion for new trial. If the motion for a new trial is thus conditionally granted, the order thereon does not affect the finality of the judgment. In the case the motion for new trial has been conditionally granted and the judgment is reversed on appeal, the new trial shall proceed unless the appellate court has otherwise ordered. In case the motion for new trial has been conditionally denied, the appellee on appeal may assert error in that denial; and if the judgment is reversed on appeal, subsequent proceedings shall be in accordance with the order of the appellate court.

Fed. R. Civ. P. 59(c) (emphasis added). Accordingly, Rule 59(c) required the Court to grant or deny the motion for a new trial and specify grounds for its decision. The Court agrees that it did not properly consider Sprint's motion for new trial. Plaintiff was not afforded an opportunity to respond to the written motion and neither party had an opportunity at the hearing to argue their positions. Furthermore, the Court failed to specify grounds for the denial. Consequently, the Court will reexamine its ruling.

2. Motion to Reconsider Under Rules 59(e) or 60(b)

A motion under Federal Rule of Civil Procedure 59(e) to alter or amend a judgment draws into question the correctness of a judgment. *Norman v. Arkansas Dept. of Educ.*, 79 F.3d 748, 750 (8th Cir. 1996). Rule 59(e) was adopted to codify the district court's power to rectify its own mistakes in the period immediately following the entry of judgment. *Id.* Alternatively, a Rule 60(b) motion serves to relieve a party from a final judgment or order on one of six specified grounds. *See* Fed R. Civ. P. 60(b). The last articulated ground is a catch-all provision that authorizes "any other reason justifying relief from the operation of the judgment." *Id.* The Eighth Circuit has interpreted this Rule to provide for extraordinary relief "which may be granted only upon an adequate showing of exceptional circumstances." *United States v. Young*, 806 F.2d 805, 806 (8th Cir. 1986) (per curiam). Under either Rule 59 or 60, the Court finds it necessary to reconsider its ruling denying Sprint's motion for a new trial. As a result, because the Court did not hear argument on the motion for new trial and because Couch did not have the opportunity to submit a written response to Sprint's motion, the Court will permit Plaintiff twenty (20) days from the date of this Order to file a motion and brief opposing Sprint's motion for new trial under Rule 59(a).

V. ORDER

Based on the foregoing, it is hereby ORDERED that Sprint's Motion for Judgment as a Matter of Law on Jerry

Couch's race, gender, and retaliation claims is GRANTED. It is further

ORDERED that the Court will reconsider its denial of Sprint's motion for new trial under either Rule 59(e) or 60(b). The Court therefore ORDERS Plaintiff to file a motion and brief opposing Sprint's motion for new trial within fifteen (15) days from the date of this Order. The Court will not consider a reply brief.

/s/ Dean Whipple
Dean Whipple
United States District Judge

Date December 26, 1996

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 97-1368WMKC	*	
Jerry D. Couch,	*	Order Denying Petition
	*	for Rehearing and
Appellant,	*	Suggestion for Rehearing
	*	En Banc
vs.	*	
Sprint Corp.,	*	
	*	
Appellee.	*	

The suggestion for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

January 28, 1998

Order Entered at the Direction of the Court:

/s/ Michael E. Gans
Clerk, U.S. Court of Appeals, Eighth Circuit

DEPOSITION EXHIBIT
3
4-16-96

PROMOTIONS AND HIRES – GRADES 74-79
CONTRACTS & NATIONAL AGREEMENTS
January 1, 1994 to October 13, 1995

NAME/RACE/SEX	DATE	POSITIONS
Sara Miller (WF)	3/94	Sr. Nat. Agr. Nego. to Mgr. Nat. Agr.
Carol Bales (WF)	4/5/94	Buyer/Corp. Agr. Nego.
Vicki Moreno (WF)	5/94	Contracts Nego. to Nat. Agr. Nego.
Mary Ann Sligh (WF)	5/19/94	Nat. Agr. Adm.
Joyce Christanio (BF)	5/31/94	Exec. Asst. to Corp. Agr. Nego.
Julie D'Agostino (WF)	6/23/94	Lead Negotiator
Patricia Porter (WF)	6/94	Sr. Cont. Nego. to Lead Nego.
John E. Gallegos (HM)	7/10/94	Corp. Agr. Nego.
Sara Shepherd (WF)	7/94	Sr. Nat. Agr. Nego. to Mgr. Corp. Agr.
David Moe (WM)	7/94	Sr. Cont. Nego. to Mgr. Corp. Agr.
Linda Hart (WF)	9/19/94	Lead Negotiator
Sara Miller (WF)	10/16/94	Mgr. Nat. Agr. to Lead Nego.

Sara Shepherd (WF)	10/24/94	Mgr. Corp. Agr. to Mgr. Nat. Agr.
Isaiah (Ike) Brown (BM)	1/16/95	Mgr. Corp. Agr.
Carol Lineberry (WF)	1/95	Nat. Agr. Nego.
Judy Novosel (WF)	1/10/95	Corp. Agr. Nego. to Nat. Agr. Nego.
Ben Wilson (WM)	1/10/95	Assoc. Corp. Agr. Nego. to Corp. Agr. Nego.
Debra Rector (WF)	5/2/95	Contracts. Coor. to Corp. Agr. Nego.
Kevin Neuer (WM)	5/15/95	Lead Negotiator

PLAINTIFF'S
EXHIBIT
50
Case No. CV95-0675

Supreme Court, U.S.
FILED
MAY 27 1998
OFFICE OF THE CLERK

No. 97-1743

In The

Supreme Court of the United States

October Term, 1997

JERRY D. COUCH,

Petitioner,

v.

SPRINT CORPORATION,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

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STATEMENT REQUIRED BY RULE 29.6

Sprint Corporation has no parent companies. In addition to its wholly-owned subsidiaries, Sprint Corporation has ownership interests, either directly or through wholly-owned subsidiaries, in Centel Corporation; The CenDon Partnership; Central Telephone Company; North Supply Chile, S.A.; Asian American Communications, L.L.C.; Telmex/Sprint Communications, L.L.C.; Sprint Communications Company L.P.; Call-Net Enterprises, Inc.; United Telephone Company of Kansas; SprintCom Equipment Company, L.P.; Sprint Enterprises, L.P.; Sprint Spectrum Holding Company, L.P.; American PCS, L.P.; American PCS Communications, L.L.C; APC PCS, L.L.C; APC Realty and Equipment Company, L.L.C; Cox Communication PCS, L.P.; NewTelco, L.P.; Sprint Spectrum L.P.; Sprint Spectrum Equipment Company, L.P.; Sprint Spectrum Realty Company, L.P.; WirelessCo, L.P.; MinorCo, L.P.; PhillieCo, L.P.; Global One Communications Europe, L.L.C.; Global One Communications GBN Holding, Ltd.; Global One Communications and Information Services Ltd. Joint Venture; Sprint International Italia S.p.A.; Global One Communications S.A.; Global One Communications Romania S.A.; Global One Telekomunikasyon Limited Sirketi; Global One Communications, L.L.C.; Global One Networks (Joint Venture); Global One Communications Operations, Ltd.; Global One Communications Service, B.V.; Global One Communications World Holding B.V.; Sprint RPG India, Ltd. (Joint Venture); Global One Communications Jordan (Joint Venture); Global One (Joint Venture); France Telecom Network Services Singapore Pte Ltd.; Global One

STATEMENT REQUIRED BY RULE 29.6 – Continued

Communications World Operations Ltd.; Global One Communications World Service B.V.; Sprint Enterprises, L.P.; Sprint/United Midwest Management Services Company; Vista-United Telecommunications; United Telephone Company of Kansas; Sprint/United Midwest Management Services Company; Valley Network Partnership; SC Seven Company; Sprint Communications Company L.P.; SprintCom Equipment Company L.P.; Sprint Enterprises, L.P.; Iridium U.S., L.P.; Sprint Enterprises, L.P.; Dial - The Israeli Company For International Communication Services Ltd.; Marconi-Sprint Servicos de Comunicacao, Lda.; Sprint Global Venture, Inc.; Sprint R.P. Telekom Sp. zo.o.

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OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

This is an unexceptional case which presents no important question of federal law and no circuit conflict. Petitioner Jerry Couch, a white male, brought a lawsuit under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e *et seq.* ("Title VII"), and the Missouri Human Rights Act, Mo. Rev. Stat. § 213.055. He alleged that Sprint Corporation ("Sprint") passed him over for promotion because of his race and sex, and later demoted him in retaliation for complaining about Sprint's alleged discrimination.

A jury returned a verdict in Couch's favor on all of his claims. The District Court, which had reserved decision on Sprint's motion for judgment as a matter of law both at the close of Couch's case-in-chief and at the close of all evidence, granted Sprint's renewed motion following the jury verdict. The District Court concluded that Couch had failed to produce sufficient evidence that Sprint's stated reasons for its employment decisions were pretexts for intentional race and sex discrimination. The District Court further concluded that no reasonable jury could find that Couch's alleged complaint of discrimination played any role in his demotion because the chief decisionmaker had no knowledge of Couch's alleged complaint. The United States Court of Appeals for the Eighth Circuit adopted the District Court's analysis and affirmed.

No compelling reason exists to grant the petition for a writ of certiorari in this unremarkable employment discrimination case. The *only* issue in this case is whether

Couch produced sufficient evidence to support his three distinct claims of discrimination and retaliation, an issue particularly ill-suited for Supreme Court review. While Couch now seeks to recast his case as one implicating the issue of "diversity" in the workplace, Sprint's commitment to workplace diversity played no role in the specific employment decisions at issue. Moreover, far from disregarding or modifying the legal standard for granting judgment as a matter of law under Rule 50 of the Federal Rules of Civil Procedure, the District Court's and Eighth Circuit's conclusion that no jury could reasonably find that intentional discrimination or retaliation played any role in the employment decisions at issue in this case was in full accord with Rule 50's well-settled principles and this Court's pronouncements on the burden of proof in employment discrimination cases. In short, there is nothing about this case that warrants or justifies review by this Court.

COUNTER STATEMENT OF THE CASE

I. Relevant Facts Governing The Specific Employment Actions At Issue

Although it is not apparent from his petition, Couch challenges only three distinct employment decisions: (a) the promotion of Sara Shepard to the position of Manager, National Agreements; (b) the hiring of Isaiah Brown to the position of Manager, Corporate Agreements; and (c) the decision to demote Couch one grade without a loss of pay. The dispositive facts surrounding these decisions, although largely ignored by the petition, are undisputed.

In 1993, Couch worked as a Grade 75 National Agreements Negotiator in the Materials Management department. Sara Shepard, a white female, held the same title, but at a higher Grade 76 level. Mike McCormick, a white male who then supervised Shepard and Couch, had promoted Shepard to the Grade 76 level because she had shown outstanding leadership skills and consistently had outperformed and received higher evaluations than Couch.

In late 1993 and early 1994, Sprint combined the Materials Management and Business Services departments to form the Materials & Services Management department ("M&SM"). Lauren Wright, a white female, was selected to head the new department. Shortly thereafter, Sprint hired Benn Sledge, a black male, to serve as Director of Contracts and National Agreements in the M&SM department.

In October 1994, the position of Manager, National Agreements in the M&SM department became vacant. Four individuals applied for the position, and two – Shepard and Couch – were interviewed. Sledge, in consultation with McCormick, chose Shepard to fill the vacancy. Sledge and McCormick concluded that Shepard had consistently outperformed and received higher evaluations than Couch, and that her strong leadership skills were particularly well-suited for this managerial position. Additionally, in May 1994, Couch had received a verbal warning for deficiencies in his ability to work with others, communication skills and customer service.

After Sprint announced Shepard's promotion to Manager, National Agreements, Couch complained to Sledge

that he was more qualified than Shepard and should have been promoted in her stead. Couch did not, however, state that he believed that Shepard had received the position because of her gender or that he had been denied the promotion because he was a man. Additionally, Sledge did not tell anyone of Couch's complaint.

In November 1994, the position of Manager, Corporate Agreements became available. As Couch admitted at trial, Sprint's written job application procedure required internal candidates to submit a Job Interest Request ("JIR") form to be considered for posted positions. Indeed, Couch testified he knew of no internal candidate who received a posted position without first submitting a JIR. Nevertheless, Couch did not submit a JIR for the Manager, Corporate Agreements position. Thus, he was not even considered for the position.

In January 1995, Sprint hired Isaiah Brown, a black male, for the Manager, Corporate Agreements position. Brown had managerial experience at Hallmark Cards and procurement experience from his service in the military. Wright, Sledge, McCormick and David Fogelman, another white male, all participated in the hiring decision. They jointly concluded that Brown's proven leadership ability and qualifications would be a good fit for the position.

Shortly before Sprint hired Brown, Couch had been placed on final written warning for improperly renegotiating a national pager agreement (the Air Signal agreement) to Sprint's detriment. Although Couch admits he had promised one of the M&SM department's internal

customers, Lee Jobe, that he would not amend the agreement until Jobe and he discussed it further, Couch renegotiated the contract without affording Jobe the opportunity to comment on the change. When Jobe learned of the change, and the amount of money his group would lose as a result, he complained to both Wright and Sledge.

After investigating Jobe's complaint, Sprint concluded that Couch had exercised poor business judgment. Consequently, on December 15, 1994, Couch received a final written warning for his conduct. Moreover, Wright, in consultation with Sledge, Shepard, Sara Miller and Angela Webster, decided to take further disciplinary action against Couch. Although Wright wanted to terminate Couch because of his conduct, Sledge successfully argued that Couch only should be demoted. Accordingly, Couch ultimately was demoted from a Grade 75 to a Grade 74 position, *but without any decrease in pay*. There is no record evidence that Wright, Shepard, Miller or Webster knew of Couch's complaint to Sledge concerning Shepard's promotion at the time of Wright's demotion decision.

II. The District Court's Decision

In granting Sprint's motion for judgment as a matter of law, the District Court applied the following legal standard of review:

> Judgment as a matter of law is appropriate when the evidence points one way and is susceptible of no reasonable inference sustaining the position of the nonmoving party. *White v.*

> *Pence*, 961 F.2d 776, 779 (8th Cir. 1992). Although every reasonable inference is to be drawn in the plaintiff's favor, an inference is reasonable only if it can be drawn from the evidence without resorting to speculation. *Frieze v. Boatmen's Bank of Belton*, 950 F.2d 538, 541 (8th Cir. 1991); *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 . . . (1986) (stating that, upon motion for summary judgment or motion for directed verdict, a judge must ask "whether a fair-minded jury could return a verdict for the plaintiff on the evidence presented" and that "a mere existence of a scintilla of evidence" in support of the plaintiff's position will be insufficient).

(App. 13).

The District Court then carefully applied this standard to each of Couch's claims. With respect to Couch's race discrimination claim, the District Court concluded that the record evidence established that Sprint had hired Brown because he was a qualified candidate, and that Couch had not been considered for the position because he had not filled out the required JIR (App. 19). The District Court further noted that Couch knew of no other employee who had received a posted position at Sprint without first completing a JIR (App. 19).

The District Court then concluded that Couch had failed to present any record evidence that would allow a jury to reasonably find that Sprint's reasons were pretextual "and that the real reason for [Sprint's] action was intentional discrimination" (App. 20) (citing to *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993)). The District Court noted that the "bulk of Plaintiff's evidence sought

to suggest that, because Sledge was black, his participation in the hiring of another black male was evidence of discrimination against Couch" (App. 20). The District Court found such evidence to be insufficient as a matter of law for two reasons. First, a black supervisor's decision to hire a black employee was not probative evidence of intent to discriminate against Couch (App. 20).[1] Second, the uncontroverted evidence demonstrated that Sledge was not the sole decisionmaker in hiring Brown; rather, Wright, McCormick, Miller and Shepard, all of whom are white, also participated and concurred in the decision to hire Brown (App. 20). Based on this overwhelming evidence, the District Court concluded:

> [T]he evidence merely demonstrated that a black man was hired into a position that Plaintiff desired but for which he did not formally apply. *Plaintiff has failed to set forth sufficient affirmative evidence demonstrating that a factual issue of pretext and the ultimate issue of discrimination exists.*

(App. 20) (emphasis added).

The District Court likewise carefully considered the evidence relating to Couch's sex discrimination claim. It noted the following facts were undisputed:

- Each of Sprint's witnesses testified that Shepard's promotion was based on her superior communication and leadership skills and

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[1] Contrary to Couch's implied suggestion, "networking" is not evidence of illegal discrimination. While hiring a friend may be "unfair," it is "not a violation of state and federal laws prohibiting" "discrimination in employment." *Brandt v. Shop 'N Save Warehouse Foods, Inc.*, 108 F.3d 935, 938-39 (8th Cir. 1997).

qualifications, and had nothing to do with her gender (App. 22-23)

- Shepard consistently earned job performance evaluations that were superior to those of Couch (App. 22-23)
- All of Couch's supervisors testified that he lacked the leadership and communication skills necessary for a management position (App. 23)
- Couch admitted that Shepard was qualified for the position (App. 22-23)
- McCormick, a white male, had promoted Shepard to Grade 76, a position more senior than that of Couch, prior to the promotion decision at issue (App. 23)

Based on these undisputed facts, the District Court concluded:

> The evidence at trial *was susceptible to only one interpretation* – Sprint's management personnel exercised business judgment and promoted Sara Shepard to Manager, National Agreements because of her superior qualifications and not because of her gender. *No reasonable jury could find otherwise.*

(App. 23-24) (emphasis added).

Finally, the District Court carefully reviewed the evidence relating to Couch's claim that Sprint demoted him (but with no salary loss) in retaliation for complaining to Sledge about Shepard's promotion to the position of Manager, National Agreements. The District Court observed that the following facts were undisputed: Couch never told any Sprint manager or employee that he believed he

had been denied a promotion for *discriminatory* reasons; Wright, Jobe and Sledge testified that Sprint demoted Couch because of their belief that he had exercised poor judgment in renegotiating the Air Signal contract without affording Jobe the opportunity to comment on the change; and Couch had produced no evidence that Wright, the decisionmaker, knew that Couch had complained to Sledge about Shepard's promotion (App. 25-27). Based on these undisputed facts, the District Court concluded that "a *reasonable jury* could not find that Plaintiff's complaint played any role in Plaintiff's demotion without resorting to speculation. Consequently, judgment as a matter of law is appropriate" (App. 27) (emphasis added).

REASONS WHY THE WRIT SHOULD BE DENIED

I. This Case Is Inappropriate For Supreme Court Review Because It Simply Involves An Examination Of The Sufficiency Of Evidence Presented At Trial

"A petition for writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." S. Ct. R. 10. Yet, erroneous factual findings are exactly what Couch asks this Court to review:

> The district court and the Eighth Circuit's decisions to *ignore* completely the probative *evidence* of race and sex based employment decisions based on Sprint's commitment to diversity cannot be tolerated by this Court. The Court should grant the writ to find that *evidence* of an

> employer's commitment to diversity which created race and gender based employment decisions is *probative* of discrimination and would support the jury's verdicts in this case.

(Pet. at 20) (emphasis added). Furthermore, Couch concedes that he seeks relief from the lower courts' "obvious" failure to apply a rule of law – namely, the "well settled" standard for granting judgment as a matter of law (Pet. at 20, 23). In essence, Couch's petition boils down to a request that this Court reevaluate the evidence and find that the District Court and Eighth Circuit reached the wrong factual conclusions. Supreme Court Rule 10 explicitly declares such a case to be inappropriate for review by this Court.

II. Contrary To Couch's Characterization, This Is Not A "Workplace Diversity" Case

Recognizing that his fact-based case is particularly unsuited for Supreme Court review, Couch seeks to recast his case as one implicating the issue of diversity in the workplace. There is *no* evidence, however, that Sprint's commitment to diversity played any role in the *specific* decisions to promote Shepard, hire Brown or demote Couch. Indeed, Sprint never even suggested that any of the employment decisions at issue in this case were motivated in whole or in part by improving diversity in the workplace. Not surprisingly, therefore, Couch did *not* present the issue of workplace diversity to the Eighth Circuit. His Statement of Issues to the Court of Appeals made no reference to "diversity," but instead contended only that the evidence and reasonable inferences from the evidence supported the jury's verdict. Indeed, both to the

Eighth Circuit and this Court (Pet. at 19), Couch characterized Sprint's commitment to diversity merely as "background evidence" that the District Court improperly disregarded in granting Sprint's motion for judgment as a matter of law.[2]

Because this case has nothing to do with diversity, *Taxman v. Bd. of Educ. of the Township of Piscataway*, 91 F.3d 1547 (3d Cir. 1996), *cert. granted*, 117 S. Ct. 2506, *cert. dismissed*, 118 S. Ct. 595 (1997), is inapposite. In *Taxman*, the United States brought a Title VII action challenging the Piscataway school board's affirmative action plan of preferring minority teachers over nonminority teachers in layoff decisions where teachers were equally qualified. The school board's affirmative action policy specifically

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[2] In his effort to make this case a workplace diversity case, Couch distorts the record. He asserts that Sprint's commitment to diversity applied to hiring and promotion decisions. (App. 6). That is not correct. As all of the decisionmakers in the M&SM department testified, the diversity commitment merely broadened the pool of applicants; Sprint still hired or promoted the most qualified candidate from that pool. In the absence of any evidence that the diversity commitment motivated a specific employment decision, "[a]n employer's affirmative efforts to recruit minority and female applicants does not constitute discrimination." *Duffy v. Wolle*, 123 F.3d 1026, 1038-39 (8th Cir. 1997), *cert. denied*, No. 97-1371 (May 26, 1998) (explaining why an effort to broaden the applicant pool is not discriminatory and why such a policy does not harm white males in any way other than forcing them to compete against a larger pool of qualified applicants). *Accord Silver v. City University of New York*, 947 F.2d 1021, 1022 (2d Cir. 1991); *Ditzel v. University of Medicine and Dentistry of New Jersey*, 962 F. Supp. 595, 605 (D.N.J. 1997); *Messer v. Meno*, 936 F. Supp. 1280, 1293 (W.D. Tex. 1996).

stated that, "when candidates appear to be of equal qualification, candidates meeting the criteria of the affirmative action program will be recommended." *Id.* at 1550. In accordance with that policy, the school board specifically relied on race as the determining factor in selecting which of two equally qualified employees to lay off. *Id.* at 1551-52.

By contrast, in this case, Couch was not as equally qualified as Brown or Shepard. In fact, both were far more qualified than Couch. More importantly, there is no evidence that Sprint's commitment to diversity, Brown's race or Shepard's sex played any role in the promotion or hire decisions at issue. Rather, the uncontroverted facts establish that those decisions were based on legitimate, nondiscriminatory reasons, and that race, sex or diversity played no role.[3] Thus,

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[3] Couch's contention that 16 of the 19 advances in Sledge's group went to females or minorities is beside the point. He presented no evidence regarding the qualifications required for those jobs, the relative qualifications of the candidates or the reasons for selection in those cases. The bare statistic has no probative value, especially with respect to the employment actions relating to Couch. *See Schultz v. McDonnell Douglas Corp.*, 105 F.3d 1258, 1259 (8th Cir.), *cert. denied*, 118 S. Ct. 56 (1997) ("statistics must evaluate comparable employees to be meaningful indicators of pretext"); *Sheehan v. Daily Racing Form, Inc.*, 104 F.3d 940, 942 (7th Cir.), *cert. denied*, 117 S. Ct. 2480 (1997) (statistical analysis of list of 17 employees held inadmissible where expert failed to correct for any potentially explanatory variables other than age and ignored the fact that the 17 employees held a variety of jobs). Indeed, on March 25, 1997, the district court granted Sprint's alternative motion for a new trial because it concluded that Couch's emphasis on this irrelevant statistical evidence resulted in an unreliable jury verdict.

the legality of considering workplace diversity as a motivating factor in an employment decision is not presented by this case.

III. Neither The District Court Nor The Eighth Circuit Created Or Applied The Wrong Standard For Granting Judgment As A Matter of Law

Couch argues that this Court should grant the petition because the District Court and the Eighth Circuit disregarded the clear standard for granting judgment as a matter of law, thereby depriving him of his right to trial by jury.[4] Alternatively, he claims that the Eighth Circuit has created inconsistent standards in ruling on judgment as a matter of law pursuant to Rule 50 by applying one standard before submitting the case to a jury and a different standard when reviewing the motion after a jury verdict. Neither contention has merit.

A. The Lower Courts Properly Applied The Correct Standard Under Fed. R. Civ. P. 50

As the Eighth Circuit stated (App. 1), and as Couch concedes, the standard for granting Rule 50 motions is "well settled" (Pet. at 23). Thus, this case is about application of a legal standard – not the propriety of the standard. The lower courts' alleged failure to apply this "well

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[4] Of course, "it is settled that Rule 50(b) does not violate the Seventh Amendment's guarantee of a jury trial." *Neely v. Martin K. Eby Construction Co.*, 386 U.S. 317, 321 (1967).

settled" standard is particularly ill-suited for review by this Court. *See* Part I *supra*.[5]

Notwithstanding Couch's assertions to the contrary, the District Court unquestionably applied the proper standard. As Couch correctly notes, Rule 50 requires a court to consider the evidence in the "light most favorable to the plaintiff," to give the plaintiff "the benefit of all favorable inferences that may reasonably be drawn," and to grant judgment as a matter of law "only when all the evidence points one way and is susceptible of no reasonable inferences sustaining the position of the nonmoving party" (Pet. at 21-22). This is the *exact* standard that the District Court followed. Specifically, the District Court stated that "[j]udgment as a matter of law is appropriate when the evidence points one way and is susceptible of no reasonable inference sustaining the position of the nonmoving party," and that "every reasonable inference is to be drawn in the plaintiff's favor" (App. 13). Significantly, although Couch now claims that the District Court applied an incorrect standard, he did not make that argument to the Eighth Circuit. His only argument to the Eighth Circuit was that the District Court misapplied the standard.

Thus, Couch's contention that the Eighth Circuit "agreed with the district court that there is no 'substantial

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[5] As this Court has recognized, "[d]etermination of whether a new trial should be granted or a judgment entered under Rule 50(b) calls for the judgment in the first instance of the judge who saw and heard the witnesses and has the feel of the case which no appellate printed transcript can impart." *Cone v. West Virginia Pulp & Paper Co.*, 330 U.S. 212, 216 (1947).

evidence' that Sprint's given reasons were a pretext for discrimination" (Pet. at 23) is disingenuous. In fact, the words "substantial evidence" do not even appear in the District Court's decision.[6] Rather, the District Court concluded that the evidence was *"susceptible to only one interpretation"* and that Couch failed to set forth *"sufficient affirmative evidence"* to demonstrate that discrimination existed – the very standard that Couch recognizes is "clear and well stated in the Eighth Circuit" (*see* Pet. at 21, noting that a motion for judgment as a matter of law presents a legal question: "whether there is sufficient evidence to support a jury verdict"). *See also* Fed. R. Civ. P. 50(a) (judgment as a matter of law is appropriate if "there is no legally sufficient basis for a reasonable jury to find for the party on that issue").[7]

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[6] This misstatement of the record, considered alone, requires that the petition be denied. Supreme Court Rule 14.4 provides that "[t]he failure of a petitioner to present with accuracy, brevity, and clarity whatever is essential to ready and adequate understanding of the points requiring consideration is sufficient reason for the Court to deny a petition."

[7] Contrary to Couch's contention, neither the District Court nor the Eighth Circuit "weighed" the evidence or made credibility determinations in deciding Sprint's motion. Rather, the District Court concluded that the uncontested evidence was susceptible to only one reasonable interpretation: Couch's sex, race or alleged complaint played no role in the employment decisions at issue (App. 20, 24, 27). As this Court has stated, "directed verdict is mandated where the facts and the law will reasonably support only one conclusion." *McDermott International, Inc. v. Wilander*, 498 U.S. 337, 356 (1991). *See also Anderson*, 477 U.S. at 251 (directed verdict proper where the evidence "is so one-sided that one party must prevail as a matter of law").

Because the District Court applied the correct legal standard in deciding Sprint's Rule 50 motion, it necessarily follows that the Eighth Circuit likewise reviewed the case under the proper standard by its agreement with the District Court. While the Eighth Circuit may have made an isolated reference to the lack of "substantial evidence" in the record, a careful review of the Court of Appeals' decision establishes that it merely adopted the District Court's analysis and conclusions:

> Because the controlling law is clear, our review satisfies us that an opinion would have no precedential value in this fact-intensive case. We agree with the district court's analysis and conclude the district court correctly granted the motion for judgment as a matter of law. We thus affirm the judgment without further discussion.

(App. 2).[8]

Moreover, a recent decision by the Eighth Circuit forecloses any contention that its decision in this case constitutes a departure from the well-settled standards of Rule 50. In *Cross v. Cleaver II*, ___ F.3d ___, 1998 WL 164414 at *5 (8th Cir. April 10, 1998), the Court of Appeals articulated and applied the precise standard on which

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[8] Indeed, in its opinion, the Eighth Circuit expressly refers to the well-established Rule 50 standards (App. 1) (noting that "there is no evidence tending to show that the head of his department . . . knew about Couch's complaint until after the demotion decision was made" and concluding that "Couch's meager evidence would not permit a jury reasonably to find there was any connection between Couch's promotion-related complaint and his demotion for poor business judgment").

Couch relies in his petition. Thus, no compelling reason requires review by this Court.

B. Neither The District Court Nor The Eighth Circuit Adopted A Different Standard Of Review For Considering A Motion For Judgment As A Matter Of Law After The Return Of A Jury Verdict

In a final futile attempt to gain review by this Court, Couch maintains that the District Court's reference to the burden-shifting analysis set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), somehow created a different standard of review for considering a post-verdict Rule 50 motion and improperly placed on Couch "the burden of proving pretext and looked for 'substantial evidence' of that proof" (Pet. at 27). Again, Couch's argument misstates what took place in the lower courts.

Foremost, as discussed above, the District Court never even mentioned "substantial evidence" in its opinion. Rather, the District Court properly analyzed the evidence in this case under the well-established Rule 50 standards. *See* Part III.A *supra*.

Moreover, the District Court's decision is in full accord with this Court's decisions in *Hicks, Postal Service Bd. of Governors v. Aikens*, 460 U.S. 711 (1983); *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248 (1981), and *McDonnell Douglas*. As this Court noted in *Hicks*, the *McDonnell Douglas* burden-shifting scheme exists to force the defendant "to come forward with some response"; once the defendant's production has been made, "the trier of fact proceeds to decide the ultimate question:

whether plaintiff has proven 'that the defendant intentionally discriminated against him' because of his race [or sex]." *Hicks*, 509 U.S. at 510-11.[9] There is no question that the District Court faithfully adhered to *Hicks*'s holding by analyzing the sufficiency of the evidence for a finding of intentional race or sex discrimination. *See* App. 20 (Couch was required to show the "existence of evidence of some additional facts that would allow a jury to find that Sprint's proffered reason was a pretext and that the real reason for its action was intentional discrimination," citing to *Hicks*); App. 23 (to succeed on his sex discrimination claim, "Plaintiff needed to prove that Sprint's stated reasons for promoting Sara Shepard were not true but merely pretextual and that the [sic] Sprint's actual motive for the decision was intentional discrimination based on gender").

Therefore, far from deciding Sprint's Rule 50 motion based on the *McDonnell Douglas* burden-shifting analysis, the District Court properly reached the "ultimate question": whether Couch had presented sufficient evidence that the real reason for Sprint's actions was intentional discrimination. And, as Couch recognizes (Pet. at 29), the Eighth Circuit essentially adopted the District Court's analysis and opinion. Thus, no incorrect or conflicting standard exists in the Eighth Circuit that requires review by this Court.

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[9] Given that the *McDonnell Douglas* burden-shifting scheme exists to force the defendant to come forward with legitimate, non-discriminatory reasons for its actions, *Hicks*, 509 U.S. at 510-511, Couch can hardly argue that he was prejudiced by the District Court's use of that analytical framework.

IV. The District Court's Grant Of A New Trial Further Militates Against Supreme Court Review

Finally, Couch's petition ignores the procedural posture of this case. Couch fails to address the fact that the District Court granted Sprint's alternative motion for a new trial pursuant to Federal Rules of Civil Procedure 59(e) and 60(b) because Couch's undue emphasis on flawed statistical evidence that the District Court should have excluded resulted in an unreliable jury verdict. Thus, even if this Court were to overturn the decision to grant Sprint's motion for judgment as a matter of law, the jury verdict still will not stand. Coupled with the absence of any compelling reason supporting Couch's petition, the procedural posture of this case further makes this case inappropriate for review by this Court.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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